

*Al- Qawā'id al-Fiqhiyyah* (Islamic Legal Maxims):  
Concept, Functions, History, Classifications and  
Application to Contemporary Medical Issues.

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## ABSTRACT

This thesis analyses *al-qawā'id al-fiqhiyyah* (Islamic legal maxims), one of the significant disciplines of Islamic legal thought. It aims to introduce the subject theoretically and practically. For the former, it introduces the principal abstract areas relating to the discipline: namely, definition, functions, types, sources, relationship with other disciplines of Islamic legal thought. It also traces the historical development of the discipline from the earliest stages to recent times. These areas are covered in the first two chapters, which comprise almost half of the whole thesis. For the practical element of the thesis, the discussion aims to present the various practical applications of *al-qawā'id al-fiqhiyyah* through two means. First, examining the so-called *al-qawā'id al-khams al-kubrā* (the five universal maxims) and *al-qawā'id al-kulliyyah* (the general maxims), which have been seen as representative of the entire field, due to their large scope of application over the *fiqh* particulars. The discussion mostly contains the examples that jurists have adduced in the course of history. In some cases, however, examples of contemporary issues have also been added. The main focus is to show the significance of *qawā'id* in categorizing the scattered and, sometimes, unmanageable *fiqh* cases into general principles. This is presented in two chapters: the third and fourth. Second, examining the use of *al-qawā'id al-fiqhiyyah* in deducing legal determination for contemporary issues. Six medical issues have been selected to be study cases in this regard. The aim is to show the importance of *qawā'id* in the area of *ijtihad* and finding out the legal status for the novel issues. This has been presented in the last chapter.

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# INTRODUCTION

## INTRODUCTION

*Ilm al-Qawā'id al-Fiqhiyyah* (the science of Islamic legal maxims) is a distinctive genre of *fiqh* (law) literature. It is concerned with legal maxims and fundamental juristic principles and the scope of their application to *juz'iyāt* (particulars). It has been considered as the cornerstone in the codification of Islamic law.

### I.1. SIGNIFICANCE OF THE SUBJECT.

The genre of *al-qawā'id al-fiqhiyyah* represents an important area of *fiqh* literature. Its importance can be seen in a number of areas, amongst which and, perhaps, the most important are presented below. Each, however, will be stated in more detail in proper sections within the thesis.

I.1.1 *Qawā'id* achieve the task of categorizing cases according to related general principles. In the course of history, *fiqh* has generally been developed by individual jurists in relation to particular themes and issues. This resulted in the existence of a huge amount of legal particulars, which, day after day, became more difficult to be accessed due to poor classification.<sup>1</sup> Were it not for *qawā'id*, *fiqh* would have remained as scattered cases, outwardly discrete without any ideational connection between them, as noted by Muṣṭafā al-Zarqā (d. 1420 / 1999).<sup>2</sup>

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<sup>1</sup> Mohammad Hashim Kamali, "Legal Maxims and Other Genres of Literature in Islamic Jurisprudence", in: *Arab Law Quarterly*, Vol. 20, No. 1, (2006), pp. 77-101, p.78.

<sup>2</sup> Muṣṭafā al-Zarqā, *al-Madkhal al-Fiqhī al-Āmm*, First Edition, (Damascus: Dār al-Qalam, 1998), 2:967. See also: Khaleel Mohammed, 'The Islamic Law Maxims', in: *Islamic Studies*, Vol. 44, No. 2 (Summer 2005), pp. 191-207, p.191.

Hence, *qawā'id*, as stated by Kamali, represent the peak of cumulative progress, which could not have been expected to take place at the formative stages of the development of *fiqh*.<sup>3</sup> Joseph Schacht, in this context, noted that *qawā'id* are mainly terse, rhythmical, alliterative sayings that are the product of early systematic reasoning.<sup>4</sup>

I.1.2 *Al-qawā'id al-fiqhiyyah* play a remarkable role in the construction of Islamic legal thought as a whole. They work to enable *fiqh* to actively survive and help to continuously provide it with proper solutions for novel issues. They reflect settled principles of law to which jurists appeal when confronting new legal cases.<sup>5</sup> Accordingly, *qawā'id* are amongst the tools, which jurists use when practicing *ijtihād* (extracting legal rulings from the sources of the law).

However, practicing *ijtihād* needs competent jurists, who possess the qualifications to achieve the intended goals. For this reason, scholars laid down requirements that a jurist must possess in order to practice *ijtihād* in the proper way.<sup>6</sup> These requirements, although seemingly numerous, can be summarized into two instead: firstly, a jurist should be upright and religious, and secondly, he should have mastery of Arabic and adequate

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<sup>3</sup> Kamali, "Legal Maxims", 80.

<sup>4</sup> Khaleel, "The Islamic Law Maxims", p.192, citing Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1959), 180-188.

<sup>5</sup> Intisar Rabb, "Islamic Legal Maxims as Substantive Canons of Construction: *Hudūd*-Avoidance in Cases of Doubt, in: *Islamic Law and Society*, Vol. 17, No. 1 (2010), pp. 63-125, p.63.

<sup>6</sup> For the definition of *ijtihād* and the requirements which a jurist should satisfy to be *mujtahid*: see: al-Sam'ānī, *Qawā'id al-Adillah f-il-Uṣūl*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), pp. 2:303-307. Al-Ghazālī, *al-Mustaṣfā Min 'Ilm al-Uṣūl*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1413 A.H), pp. 1:342-346. Al-Shawkānī, *Irshād al-Fuḥūl*, (Beirut: Dār al-Fikr, 1992), pp. 1:419-428. Yūsuf al-Qarḍāwī, *al-Ijtihād Fī-l-Sharī'ah al-Islāmiyyah*, First Edition, (Kuwait, Dār al-Qalam, 1996), pp. 15-49.

knowledge of *uṣūl al-fiqh* (legal methodology), *maqāṣid al-sharīʿah* (intentions and goals of the *Sharīʿah*) and *qawāʿid fiqhiyyah*. Hence, knowledge of these three genres, besides Arabic, are, in brief, the most significant elements, which a jurist must have adequate knowledge about to be qualified as a *mujtahid* (a person entitled to perform *ijtihād*).

I.1.3 *Al-qawāʿid al-fiqhiyyah* embody within their sphere many of the *Sharīʿah* principles and values. These include:

- 1) *ʿurf* (custom) which is the subject of the fifth universal *qāʿidah*, which reads: “*al-ʿādah muḥakkamah*” (custom can be the basis of judgments) and other subsidiary *qawāʿid*, such as: 1. “*istiʿmālu al-nāsi ḥujjatun yajibu al-ʿamalu bihā*” (public usage is conclusive and action must be taken in accordance to it).
2. “*al-mumtaniʿu ʿādatan ka-l-mumtaniʿ ḥaqīqatan*” (a thing that is customary regarded impossible is considered impossible in fact).
3. “*al-ḥaqīqatu tutraku bi-dilālati al-ʿādah*” (the original (real) meaning is to be abandoned in favour of that established by custom).

2) The theory of *istiṣhāb*, which means the continuation of the situation of a matter, whose existence or non-existence had been proven in the past, and which are presumed to remain so for lack of evidence to establish any change.<sup>7</sup> *Istiṣhāb* has been demonstrated in a number of *qawāʿid*, which are all included under the remit of the second universal *qāʿidah* that says: “*al-yaqīnu lā yazūlu bi-l-shakk*” (certainty is not overruled by doubt); such as:

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<sup>7</sup> Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Third Edition, (UK: Islamic Texts Society, 2006), 259.

1. *Al-aşlu barāʿatu al-dhimmah* (freedom from liability is a fundamental principle). 2. *Al-aşlu baqāʿu mā-kāna ʿalā mā-kān* (it is a fundamental principle that a thing shall remain as it was originally).

3) The principle of *sadd al-dharāʿiʿ* (blocking the means to evil) is also present in a number of *qawāʿid*, which in turn serves the concept of *maşlahah* (public interest). Take, for example, the *qāʿidah* which reads: “*mā-yufđi ilā al-ḥarāmi ḥarām*” (what leads to unlawful actions is also unlawful).

I.1.4. *Al-qawāʿid fiqhiyyah* help jurists to have considered knowledge of *maqāşid al-Sharīʿah* (the intentions and goals of the Sharia), as many of them are expressive, usually in a few words, of these *maqāşid*, which might not be achieved when dealing with *fiqh* particulars separately.<sup>8</sup>

I.1.5. *Al-qawāʿid al-Fiqhiyyah* embody ethical values, substantially intended by the *Sharīʿah*. In this context, the main ideas of the five universal *qawāʿid* (which will be discussed at length in chapter three), namely: intention, certainty, removal of hardship, elimination of harm and custom) are mainly ethical; yet, they are integral to the general Islamic concept of *maşlahah* (public interest), besides their legal functions. This may reflect the strong relationship between law and morality in Islam. In this respect, *Sharīʿah* is seen to be based on a system of morality and can,

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<sup>8</sup> Muhammad al-Ṭāhir ibn ʿĀshūr, *Maqāşid al-Sharīʿah al-Islāmiyyah*, First Edition, (Amman: Dār al-Nafāʿis, 2005) m 6. See also: Yaʿqūb al-Bāḥusayn, *al-Qawāʿid al-Fiqhiyyah*, First Edition, (Riyadh: Maktabat al-Rushd, 1998), 117. Mohammad Hashim Kamali, *Sharīʿah Law: An Introduction*, (Oxford: Oneworld Publications, 2008), 142.

therefore, handle many moral problems that arise in different fields from a legal perspective.<sup>9</sup>

## I.2. LITERATURE REVIEW

For these factors, jurists in the course of history from the different schools of law, both dead and surviving, have shown special care to cultivate the study of *qawā'id fiqhiyyah*. In almost every book of *fiqh*, beginning with the pioneering works and up to the books by contemporary figures, one can come across dozens of *qawā'id* scattered in the various chapters. Works as early as *al-Mudawwanah* of Mālik (d. 179 / 795), *al-Kharāj* of Abū Yūsuf (d. 182 / 798) and *al-Umm* of al-Shāfi'ī (d. 204 / 820) contained a significant number of them for different purposes, as will be explained later (refer to section 2.2.2 below).<sup>10</sup> Some *qawā'id* have also been ascribed to scholars, who lived in times earlier than the time of Mālik, such as al-Qādī Shurayḥ (d. 76 / 695) and Khayr ibn Nu'aym (d. 137 / 754).<sup>11</sup>

With the passage of time, scholars gave more attention to *qawā'id*, and small treatises compiled to contain them exclusively, started to emerge as early as the fourth *Hijrī* century / tenth AC. Since then, a huge number of *qawā'id* books have been written and the genre started gradually to be distinct, until it reached an advanced stage from the eighth / fourteenth to the tenth / sixteenth centuries.

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<sup>9</sup> See: Omar Hasan Kasule, *Medical Ethics from Maqasid Al Shari'a* at: (<http://islamthought.wordpress.com/2008/12/14/medical-ethics-from-maqasid-al-shari%E2%80%9999a/>).

<sup>10</sup> See, for some examples: 'Alī al-Nadwī, *al-Qawā'id al-Fiqhiyyah*, (Damascus: Dār al-Qalam, 1998), pp. 94-103.

<sup>11</sup> Ibid., pp.93-94, citing Wakī' ibn Ḥayyān's *Akhhbār al-Qudāt*, 2:319 and 3:231 respectively.

Almost all famous jurists from the four schools of law have participated in the development of the discipline. The most well-known pre-modern works on *qawā'id* literature are those compiled by famous scholars, such as: *Ta'āsīs al-Nazar* by al-Dabbūsī (d. 430 / 1039), *Qawā'id al-Ahkām* by 'Izz al-Dīn ibn 'Abd al-Salām (d. 660 / 1262), *al-Furūq* by al-Qarāfī (d. 684 / 1285), *al-Ashbāh wal-Nazā'ir* by ibn al-Wakīl (d. 716 / 1317), *al-Manthūr fīl-Qawā'id* by al-Zarkashī (d. 749 / 1348), *al-Qawā'id* by al-Maqqarī (d. 758 / 1357), *al-Ashbāh wal-Nazā'ir* by Taj al-Dīn al-Subkī (d. 771 / 1370), *al-Ashbāh wal-Nazā'ir* by al-Isnawī (d. 772 / 1370), *al-Qawā'id* by ibn Rajab (d. 795 / 1393), *al-Ashbāh wal-Nazā'ir* by al-Suyūṭī (d. 911 / 1505), *Īdāh al-Masālik* by al-Wansharīsī (d. 914 / 1508) and *al-Ashbāh wal-Nazā'ir* by ibn Nujaym (d. 970 / 1563).

These figures belong to the four Sunnī schools of law. This indicates that all of the schools contributed to the development of the genre of *qawā'id*, although there was a clear disparity among them in this regard. Muṣṭafā al-Zarqā (d. 1420 / 1999), and endorsed by Mohammad Hashim Kamali, thought that the Ḥanafīs were the most influential contributors in this field, followed by the Shāfi'īs, then the Hanbalīs, and following them the Mālikīs.<sup>12</sup> However, based on a historical overview, the Mālikīs were more active than the Ḥanbalīs. While the former group have participated in the compilation of *qawā'id* in all centuries, the Ḥanbalīs were almost absent for about three centuries; as no book has been ascribed to a Ḥanbalī scholar in the eleventh / seventeenth, the twelfth / eighteenth and the thirteenth / nineteenth centuries respectively.

<sup>12</sup> Muṣṭafā al-Zarqā, *al-Madkhal al-Fiqhī*, First Edition, (Damascus: Dār al-Qalam, 1998), 2:974.

Accordingly, the Ḥanafīs were the first who compiled *qawā'id* in separate treatises, as Al-Karkhī (d. 340 / 951) was pioneer in this context, for his *al-Uṣūl*, which contains around 40 maxims, was reported to be the first *qawā'id* work. Although their works were very few for the next five centuries, the Ḥanafīs' works in later stages were more systematic and disciplined. Starting from the tenth / sixteenth century, most of *qawā'id* works were by Ḥanafī scholars. It may be sufficient to prove this that *Al-Ashbāh wal-Naẓā'ir* of ibn Nujaym al-Miṣrī (d. 970 / 1563) was the focus of around forty books and treatises, most of their authors were Ḥanafīs. However, *Ta'sīs al-Nazar* by al-Dabbūsī (d. 430 / 1039) and *al-Ashbāh wal-Naẓā'ir* by ibn Nujaym are perhaps the most important contributions of the Ḥanafī school of law on *qawā'id*. The former was among the pioneering works on the genre, and was concerned with *al-fiqh al-muqāran* (comparative law), comparing between schools through examining the *qawā'id* of each. As for *al-Ashbāh wal-Naẓā'ir*, it came into existence after a long period of inactivity in the Ḥanafī school of law in this area, and was written in a systematic and disciplined way and methodology, attempting to produce a work similar to *al-Ashbāh wal-Naẓā'ir* of al-Subkī al-Shāfi'i, as ibn Nujaym declared in the introduction of his book. An elaborated presentation will be presented on the two works in sections 2.3.1 and 2.3.2.4.<sup>13</sup>

The contribution of the Shāfi'īs to *qawā'id* literature was of a greater impact in terms of volume and quality. They were very active from the seventh / thirteenth up to the twelfth / eighteenth centuries, when they

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<sup>13</sup> Ibn Nujaym al-Miṣrī, *al-Ashbāh wal-Naẓā'ir*, Fourth Edition, (Damascus: Dār al-Fikr, 2005), 10.



produced very good works. For example, some researchers recorded twelve books as the most important works in the eighth / fourteenth century; five amongst which were by Shāfiʿī scholars.<sup>14</sup> On the other hand, they were the first to use the term *al-ashbāh wal-nazāʾir* for the title of their works, to include, besides *qawāʿid fiqhiyyah*, sets of principles from other genres of law, each of which share in common an idea related to that specific genre. As such, ibn al-Wakīl, al-Subkī, ibn al-Mulaqqin (d. 804 / 1401) and al-Suyūṭī, who lived in different times, all wrote books bearing the title of *al-Ashbāh wal-Nazāʾir*. A detailed presentation of these particular works (based on my own observation) representing the real contribution of Shāfiʿī scholars in the development of the discipline of *al-qawāʿid al-fiqhiyyah* is presented in chapter two within sections 2.3.2.2 and 2.3.2.4.

As for the Mālikīs, they have a strong presence in all stages, and their works were distinctive in terms of the various methodologies they adopted in their authorship on *qawāʿid*, ranging from long works, which discuss hundreds of *qawāʿid*, as in the case of *al-Qawāʿid of al-Maqqarī* (d. 758 / 1357), to smaller treatises, as in the case of *Uṣūl al-Fityā* of al-Khushanī (d. 361 / 972), to versified treatises, as *Manẓūmat al-Manhaj al-Muntakhab* by Abū al-Ḥasan al-Zaqqāq (d. 912 / 1506). Presentations of famous Mālikī works (including *Uṣūl al-Fityā* of al-Khushanī, *al-Qawāʿid of al-Maqqarī* and *Īdāḥ al-Masālik* of al-Wansharīsī) will be presented in chapter two, within sections 2.3.1, 2.3.2.2 and 2.3.2.4.

The Ḥanbalī contribution to *qawāʿid* literature was not equal to that of any of other schools. Although many works bear the title of *qawāʿid*,

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<sup>14</sup> Al-Bāḥusay, *al-Qawāʿid*, pp. 324-335.

none can be considered as *qawā'id* work in the proper sense, except for *al-Qawā'id* of ibn Rajab. For example, ibn al-Laḥḥām's (d. 803 / 1401) *al-Qawā'id wa-l-Fawā'id* is heavily biased towards the *qawā'id uṣūliyyah* (not *fiqhiyyah*). Similarly, Yūsuf ibn ʿAbd al-Hādī's (d. 909 / 1503) short work with the title *Kitāb al-Qawā'id al-kulliyah wa-l-dawābiṭ al-fiqhiyyah*, is an exercise in legal classifications and disjunctions that has little to do with legal maxims or principles.<sup>15</sup> However, ʿAbd al-Raḥmān al-Saʿdī (1376 / 1957) wrote a number of works (elaborated in section 2.3.3.5 below), which are of remarkable value in this field.

It is worth mentioning here that many scholars who wrote on *qawā'id* have made remarkable contributions in other genres of Islamic legal thought and other disciplines, such as grammar, literature, *tafsīr* (*Qurʾānic* exegesis), etc. The phrase *kāna mushārikan fī kathīrin min al-ʿulūm* was used by historians in the biographies of many of them to express this fact; for example, Tāj al-Dīn al-Subkī wrote *Jamʿ al-Jawāmiʿ* in *uṣūl al-fiqh*, *Ṭabaqāt al-Shāfiʿiyyah* in history and biographies, *Awḍaḥ al-Masālik* in *fiqh* and *Kitāb al-Arbaʿīn* in *ḥadīth* (prophetic traditions).<sup>16</sup> Ibn Rajab al-Ḥanbali wrote *al-Tawḥīd* in theology, *Dhayl Ṭabaqāt al-Ḥanābilah* in history and biographies and *Jāmiʿ al-ʿUlūm wal-Ḥikam* in literature.<sup>17</sup> Abū al-ʿAbbās al-Maqqarī (d. 1041 / 1631) wrote *al-Riḥlah ilā al-Maghrib wal-Mashriq* in travel literature, *Rawḍat al-Ās al-ʿĀtirah bil-Anfās* in

<sup>15</sup> Wolfhart Heinrichs, "Qawā'id as a Genre of Legal Literature", in: *Studies in Islamic Law and Society*, Vol. 15: *Studies in Islamic Legal Theory*, ed Bernard G. Weiss, (Leiden: Brill, 2002), pp. 365-384", p. 373.

<sup>16</sup> Adam Al-Qudāh & Usāmah al-Rabābʿah, "Manhaj al-Imām al-Subkī fī Kitāb al-Ashbāh wal-Nazāʾir", in: *Majallat Jāmiʿat Dimashq lil-ʿUlūm al-Iqtisādiyyah wal-Qānūniyyah* (Journal of the University of Damascus for Economic and Legal Sciences), Vol. 24, No. 2, (2008), pp. 400-433, pp. 401-402.

<sup>17</sup> See:

<http://www.almeshkat.net/books/search.php?do=all&u=%C7%C8%E4+%D1%CC%C8+%C7%E1%CD%E4%C8%E1%ED>

biographies and *Idāʿat al-Dujunnah* in theology.<sup>18</sup> Perhaps, however, the most well-known figure who wrote in various disciplines is Al-Suyūṭī, as according to Aḥmad al-Khāzindār and Muhammad al-Shaybanī (in their research on the works of al-Suyūṭī, entitled: *Dalīl Makḥṭūṭāt al-Suyūṭī wa-Amākin Tawājudihā*), he authored 981 works in various arts and sciences, ranging from short treatises to long encyclopedias. For example, he wrote *al-Itqān fī ʿUlūm al-Qurʾān* and *Lubāb al-Nuqūl* in Qurʾānic sciences, *al-Ashbāh wal-Nazāʾir* and *Jamʿ al-Jawāmiʿ* in grammar, *Nazm al-Durar fī ʿIlm al-Athar* and *Tadrīb l-Rāwī* in *Ḥadīth* methodology, *Tarīkh al-Khulafāʾ* in history, *Tuḥfat al-Majālis* in literature, *al-Durr al-Manthūr* and *Tafsīr al-Jalālayn* in *tafsīr* and *al-Kawkab al-Sāṭṭiʿ* in *uṣūl al-fiqh*.<sup>19</sup>

In the modern times (from the mid-nineteenth century onward), much concern and attention has been paid to *al-qawāʿid al-fiqhiyyah*. Unlike works in the past whose main concern was confined to the collection of *qawāʿid* and demonstrating their application to particulars, studies on *qawāʿid* in this phase have followed multiple approaches and methodologies, which presented the genre in various ways. The following are what distinguish *qawāʿid* works in this phase from those compiled in the classical stages.

First, it is in this stage that works on *qawāʿid al-fiqh* comprise them exclusively, i.e. they do not include, generally speaking, principles of other genres, such as *al-qawāʿid al-uṣūliyyah*, nor do they comprise classifications and disjunctions that have little to do with legal maxims or

<sup>18</sup> See:

<http://www.almasalik.com/locationPassage.do?locationId=30903&languageId=ar&passageId=8954>

<sup>19</sup> See: Aḥmad al-Khāzindār & Muhammad al-Shaybanī, *Dalīl Makḥṭūṭāt al-Suyūṭī wa-Amākin Tawājudihā*, First Edition, (Kuwait: Dār Ibn Taymiyah, 1983). See also: *Muʿjam Muʾallafāt al-Suyūṭī* at: (<http://www.ahlalheeth.com/vb/showthread.php?t=28154>).

principles. The introductory section of *Majallat al-Aḥkām al-ʿAdliyyah*<sup>20</sup> (written in Ottoman Turkish in the year 1869 AC, and is the first codification of Islamic commercial law, includes 1851 articles.) comprising 99 *qawāʿid*, is a good example of (pure) *fiqhī* maxims work.<sup>21</sup>

Second, discussing the theoretical aspects of *qawāʿid*, such as definition, history, functions, sources classifications, position within legal context, relationships with other genres of legal thought, etc. besides their application to *fiqh* cases. The most well-known works in this regard are: 1. *al-Qawāʿid al-Fiqhiyyah: Mafhūmuhā, Nashʾatuhā, Taṭawwuruhā, Dirāsāt Muʿallafātihā, Adillatuhā, Muhimmatuhā, Taṭbīqātuhā* by ʿAlī al-Nadwī (1998). 2. *Nazariyyat al-Taqʿid al-Fiqhī wa-Atharūhā fī-Ikhtilāf al-Fuqahāʾ* by Muhammad al-Rūgī (1994). 3. *al-Qawāʿid al-Fiqhiyyah: al-Mabādiʾ, al-Muqawwimāt, al-Maṣādir, al-Dalīliyyah, al-Taṭawwur* by Yaʿqūb al-Bāḥusayn (1998).

Third, studying specific *qawāʿid* discussing all of their relevant researches in details. This approach could be the result of the method of narrowing the research subject, which seems to be the result of the contact with some Western institutions that demand that postgraduate candidates (are specific) in their proposals for degrees. The following are some of the

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<sup>20</sup> *Majallat al-Aḥkām al-ʿAdliyyah* is written in Ottoman Turkish and its original title is *Majallah el-Ahkam-i-Adilya*. However, it is known in Arab-Islamic scholarship as *Mjallat al-Aḥkām al-ʿAdliyyah* or briefly *Majallah* or *Majalla*, and it is used as such in some English articles. See: S. S. Onar, 'The Majalla', in: Majid Khadduri and Herbert J. Liebesny (ed), *Law in the Middle East*, Vol. I, (New York: AMS Press, 1984), pp. 290-321. See also: Aznan Hasan, "A Comparative Study of Islamic Legal Maxims in Majallat al-Aḥkām al-ʿAdliyyah, Jordanian Civil Code and United Arab Emirates Law of Civil Transaction", in *the Islamic Quarterly*, Vol. 48, No. 1, 2004, pp. 47-68. Therefore, I will use from now onward the full Arabic name, i.e. *Majallat al-Aḥkām al-ʿAdliyyah*, or the short name: *Majalla*.

<sup>21</sup> Al-Nadwī, *al-Qawāʿid*, 156.

books, which adopted this method. 1. *Al-Niyyah Wa-<sup>2</sup>atharuhā Fī-l-Aḥkām al-Sharʿiyyah* (1983) by Ṣāliḥ al-Sadlān, which is about the first of the five universal *qawāʿid*, i.e. “*al-umūr bi-maqāṣidihā*” (matters are judged in light of the intention behind them). 2. *Qāʿidat “Iḥmāl al-Kalām Awlā Min Ihmālīh”* (1987) by Maḥmūd Muṣṭafā Harmūsh, which is a study on this important *qāʿidah* in the theory of speech interpretation (the *qāʿidah* means: a word should be construed as having some meaning, rather than passed over in silence). 3. *Qāʿidat al-ʿĀdah Muḥakkamah, Dirāsah naẓariyyah Taʿsiliyyah Taṭbiqiyyah* (2002) by Yaʿqāb al-Baḥusayn. It is a book on the role of custom in the judiciary system based on this *qāʿidah*, which means “custom is the basis of judgment”.

Fourth, collecting *qawāʿid* in comprehensive encyclopedias. Although the main concern of classical works is to collect *qawāʿid* and engage in discussion over sets of them, the new thing here is the size of encyclopedias and the approaches followed to arrange *qawāʿid*. *Mawsāʿat al-Qawāʿid al-Fiḥiyyah* (2003) by Muhammad Ṣidqī al-Būrnū consists of twelve volumes, where *qawāʿid* are arranged alphabetically. The total number of *qawāʿid* is 4192 covering almost all the chapters of *fiqh*. *Mawsūʿat al-Qawāʿid wal-Ḍawābiṭ al-Fiḥiyyah al-Ḥākimah lil-Muʿāmalāt al-Māliyyah fī-l-Fiḥ al-Islāmī* (1999) by Ali al-Nadwī. Unlike the encyclopedia of al-Būrnū, al-Nadwī collects 3107 *qawāʿid*, which relate to *fiqh al-Muʿāmalāt* (transactions) and arranges them alphabetically.

Fifth, studying *qawāʿid* based on their legal theme. This is to discuss and study *qawāʿid*, which relate to a single subject in *fiqh*. *Al-Qawāʿid al-Fiḥiyyah li-l-Taḥkīm fī-l-Sharīʿah al-Islāmiyyah* (2000) by ʿAbd al-Salām

Ḥāmid discusses *qawā'id* relate to arbitration according to Islamic law. *Al-Qawā'id wal-Dawābiṭ al-Fiqhiyyah lī-l-Mawād al-Muḥarramah fī-l-Ghidhā' wa-l-Dawā'* (1996) by Sa'ūd al-Thubaytī discusses *qawā'id* related to prohibited substances in food and medicines.

In the more recent past (starting from the mid-twentieth century) the genre of *qawā'id fiqhiyyah* became an essential part of the curriculum of almost all academic institutions, which teach Islamic law; thus, no student can obtain a degree from any of these institutions unless he has completed specific *qawā'id* courses, nor would he aspire to be part of the judicial system unless he mastered this field of Islamic law.<sup>22</sup> Among the modern studies of *al-qawā'id*, are those by Muṣṭafā al-Zarqā, Ṣidqī al-Burnū, 'Alī al-Nadwī, 'Izzat al-Da'cās, Ya'qūb al-Baḥusayn, Bakr Ismā'īl, Ṣāliḥ al-Sadlān, Muhammad al-Rūgī, al-Ṣādiq al-Ghiryānī and Muhammad Shubayr are the most popular in the curricula of many modern Islamic universities, as in the cases of al-Azhar University in Cairo, Imam Muhammad ibn Saud University in Riyadh, the Islamic University in Medina, and the Department of Arabic and Islamic Studies in the Faculty of Literature at Tripoli University.

Moreover, the academic orientation towards editing the legacy of Islamic scholarship in the recent past played a crucial role in developing the genre of *qawā'id*. Postgraduate students were encouraged to contribute to this academic activity by editing traditional works, and treating the subject critically and historically.

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<sup>22</sup> See: Khaleel, *the Islamic Law Maxims*, 191.

Given they are comprehensive works on the theoretical aspects of *qawā'id* genre, I have made much use of the abovementioned books of al-Nadwī, al-Rūgī and al-Bāḥusayn. As for al-Nadwī's book (*al-Qawā'id al-Fiqhiyyah: Mafhūmuhā, Nash'atuhā, Taṭawwuruhā, Dirāsāt Mu'allafātihā, Adillatuhā, Muhimmatuhā, Taṭbīqātuhā*), it is originally a Masters thesis submitted to Umm al-Qurā University in Makkah in 1984, and republished several times with some changes to its title. It is a pioneering work in this regard, being the first work, which discussed the theoretical aspects of *qawā'id* comprehensively. The book is introduced in two parts, each consisting of three chapters. In the first part, discussion centres on the primary components, such as their history, scope of application, types, functions and other relevant topics. The second part is a detailed analytical comment on the most used and renowned works on *qawā'id* in the course of history from the four schools of law. Al-Nadwī now works for the International *Fiqh* Academy in Jeddah among the committees of legal experts.

Al-Bāḥusayn (who is now a member of the supreme council of scholars in Saudi Arabia) wrote his work (*al-Qawā'id al-Fiqhiyyah: al-Mabādi', al-Muqawwimāt, al-Maṣādir, al-Dalīliyyah, al-Taṭawwur*) after twelve years of teaching this discipline to postgraduate students in Imam University in Riyadh. The book is introduced in seven chapters as follows. In the first chapter, presentation is on the different definitions given to the term *qawā'id* in the past and present works, while viewing the matter critically. The second chapter deals with some primary components of *qawā'id*, such as their functions, subjects, classifications, etc. The third

chapter is on the distinctions between *qawā'id* and other genres of Islamic legal thought. The fourth chapter is on criteria of the formulation of *qawā'id*. The fifth deals with sources of *qawā'id*. The sixth discusses the legislative position of *qawā'id*. The last chapter traces the historical development of the discipline from the early beginning to the present time. The book was published for the first time in Riyadh in 1998 by *Maktabat al-Rushd*.

*Nazariyyat al-Taḳwīd al-Fiqhī wa-Atharuhā fī-Ikhtilāf al-Fuqahā'* by Muhammad al-Rūḡī is originally a PhD thesis submitted to Muhammad V University in Rabat, and published for the first time in Casablanca in 1994. The book is introduced in two parts; each divided into a number of chapters. The first part deals in detail with primary topics, such as definitions, features, sources, etc. It also discusses relationships between the formation of *qawā'id* and differences among jurists. In the second part, discussion is on the impact of the formation of *qawā'id* on the differences among the schools of law. Al-Rūḡī is currently a professor of Islamic law in Muhammad V University.

Despite the importance of *al-qawā'id al-fiqhiyyah*, it has received very little attention in Western scholarship on Islamic law. This is true with regard to both classic and more recent works. Wolfhart Heinrichs wrote:

“It is surprising that this whole complex of legal literature with its attendant terms and concepts, which has spawned a not inconsidered literary output throughout the centuries, has so far found little attention in the Western Islamicist discourse. But then the same was true, until recently, for the whole area of legal thought, *uṣūl al-fiqh*”<sup>23</sup>.

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<sup>23</sup> Wolfhart, “Qawā'id as a Genre”, p. 364.



Hashim Kamali also noted that except for a few cursory references in the works of Joseph Schacht and three other articles, there has not been any substantive coverage of legal maxims in the English language.<sup>24</sup>

As such, the genre does not appear in the writings of any of the famous writers of Western scholarship on Islamic law, either in English or, based on my own investigations, in any of other western languages. To give examples, let us examine three well-known figures in this regard; namely: Joseph Schacht, N. J. Coulson and Wael Hallaq.

Schacht, although he mentions *qawā'id* in his books, does not provide information about their nature, function, or subject. He mentions them in passing in his *Introduction to Islamic Law* and refers to them in his glossary as “rules, the technical principles of positive law, subject of special works.”<sup>25</sup> In his *Origins of Muhammadan Jurisprudence*, he described them as terse, rhythmical, alliterative sayings that are the product of early systematic reasoning.<sup>26</sup> However, his mention of *qawā'id* in this book comes in a context, where he argued that there is some cyclical attribution to provenance in that many legal doctrines, amongst them some *qawā'id*, may not have been originally cited as *ḥadīth*, but later acquired the form of *ḥadīth*. According to him, a considered number of legal traditions, which appears in the classical collections, originated after Mālik and al-Shāfiʿī. Accordingly, many legal maxims have been formulated in the pre-literary

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<sup>24</sup> Kamali, “Legal Maxims”, 77.

<sup>25</sup> Joseph Schacht, *An Introduction to Islamic Law*, (Oxford: Clarendon Press, 1964), 40.

<sup>26</sup> Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, (Oxford: Oxford University Press, 1959), 180-188. See also: Khaleel, ‘The Islamic Law Maxims’, p. 192.

period in the form of slogans, most of which became traditions from the Prophet and from other authorities.<sup>27</sup> Khaleel Mohammed noted,

“This is part of his thesis that the element of personal discretion and individual opinion in Islamic law was prior to the growth of traditions, particularly of traditions from the Prophet, but because of the success of the *muḥaddithūn* (traditionists), most of what had been originally discretionary decisions and the result of individual reasoning by the scholars was put into the mouth of the Prophet”.<sup>28</sup>

N. J. Coulson, does not mention *qawā'id* in his work entitled *A History of Islamic Law*, although the book is designed to trace the history of Islamic law. The book is introduced in three main parts, each of which discusses the development of *fiqh* in a major historical stage; namely: early stage, middle ages stage and contemporary stage respectively. In none of the fourteen chapters, which the book consists of, is there a discussion on *qawā'id*, although the author gave a detailed elaboration about another related genre, which is *uṣūl al-fiqh*, in the first part of the book.

Wael Hallaq in turn does not mention *qawā'id*, let alone having discussions on them, in any of his books, nor in his multiple essays. His *History of Islamic Legal Theory* was completely intended to be an introduction to *uṣūl al-fiqh*. *The Origins and Evolution of Islamic Law* traces the development of Islamic law with emphasis on the formative period, that is to say the first three or four centuries of its life. His third book in this series, *Authority, Continuity and Change in Islamic Law*, deals with the sources that were produced during and after the Sunni legal

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<sup>27</sup> Shacht, *Origins*, 180.

<sup>28</sup> Khaleel, 'The Islamic Law Maxims', 195.

schools were consolidated and officially recognized around the middle of the fourth / tenth century.

Now, according to Wolfhart Heinrichs, the reason for the neglect of *qawā'id* by Western Islamicist discourse is presumably to be sought in the fact that, of the two groups of people who studied Islamic law, the philologists and the lawyers, neither was much interested in the indigenous meta-discourse. The philologists were largely positivists with little interest in post-hoc constructions, as they thought, while the lawyers brought their own, Western, meta-discourse with them.<sup>29</sup> Generally speaking, however, Western concern about *fiqh* is on its historical development and on sources from which it is derived. This explains why most works are either on history of Islamic law or on *uṣūl al-fiqh* (the genre which discusses *fiqh* sources). Khaleel Mohammed noted in this regard that Western Islamicists generally categorize Islamic law into *uṣūl al-fiqh* and *fiqh*.<sup>30</sup> Further, *qawā'id* basically are abstract legal statements, which were derived from the detailed reading of the *fiqh*, and each was formulated to encompass issues in the law, which share a common legal idea in order to facilitate keeping them in mind. Therefore, their historical development, in general, is parallel with that of the *fiqh* itself and, consequently, may not require separate consideration.

Nevertheless, there are few works on *qawā'id* in English by Muslim writers. They can be classified into three categories.

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<sup>29</sup> Wolfhart, "Qawā'id as a Genre", 364.

<sup>30</sup> Khaleel, 'The Islamic Law Maxims', 191.

First, academic works; these include three PhD theses as follows: 1) *Legal Maxims in Islamic Jurisprudence: Their History, Character and Significance*, submitted in 2003 by Rashed Saud al-Amiri to the University of Birmingham. 2) *Applications of Legal Maxims in Islamic Criminal Law with Special Reference to Shari'ah Law in Northern Nigeria (1999-2007)*, submitted in 2009 by Luqman Zakariyah to the University of Wales, Lampeter. 3) *Doubt's Benefit: Legal Maxims in Islamic law, 7th-16th Centuries*, submitted in 2009 by Intisar Rabb to Princeton University (USA).

Second, journal essays; there are so far three essays in this regard:<sup>31</sup> 1) Wolfhart Heinrichs, "Qawā'id as a Genre of Legal Literature" in: Bernard Weiss, ed., *Studies in Islamic Legal Theory*, Leiden: Brill 2002, pp. 364-385. 2) Khaleel Mohammed, "The Islamic Law Maxims," in: *Islamic Studies*, Vol. 44, no. 2 (1426 / 2005), pp. 191-209.<sup>32</sup> 3) Mohammad Hashim Kamali "Legal Maxims and Other Genres of Literature in Islamic Jurisprudence" in: *Arab Law Quarterly*, Vol. 20, No. 1, 2006, pp. 77-101. There are also other articles discussing particular subjects related to *qawā'id*. For example, Intisar Rabb, "Islamic Legal Maxims as Substantive Canons of Construction: Hudūd-Avoidance in Cases of Doubt, in: *Islamic Law and Society*, Vol. 17, No. 1 (2010), pp. 63-125. Aznan Hasan, "A Comparative Study of Islamic Legal Maxims in Majallat al-Ahkām al-Adliyyah,

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<sup>31</sup> Kamali mentions in his essay (*Legal Maxims and Other Genres of Literature in Islamic Jurisprudence*) amongst the essays on *qawā'id*: Wolfhart Heinrichs, "Structuring the Law: Remarks on the Furūq literature" in Ian Richard Netton (ed.), *Studies in Honour of Clifford Edmund Bosworth. Vol. I : Hunter for the East: Arabic and Semitic Studies*, Leiden: Brill, 2000, 332-344. 2). This essay should not be listed here, because it is on *furūq*, which is a different genre within Islamic legal thought.

<sup>32</sup> Kamali, "Legal Maxims", pp. 78-79.

Jordanian Civil Code and United Arab Emirates Law of Civil Transaction”, in the Islamic Quarterly, Vol. 48, No. 1, 2004, pp. 47-68.

Third, book chapters; there are five books, which contain a chapter or more on them for different purposes, but these, at best, are only an introduction to the subject. First, *Shari'ah Law: an Introduction* by Mohammad Hashim Kamali (2008), includes a chapter on *qawā'id* entitled as “Legal Maxims of Fiqh (*Qawā'id al-Kulliyyah al-Fiqhiyyah*)”.<sup>33</sup> Second, *Islamic Law: From Historical Foundations to Contemporary Practice*, by Mawil Izzi Dien (2004), where the author presents seventeen maxims illustrating their application through examples.<sup>34</sup> Third, *Falsafat al-Tashrī fī al-Islām* by S. Mahmassani, translated by Farhat J. Ziadeh (1961), which also includes a chapter (around 50 pages) on *qawā'id*.<sup>35</sup> Fourth, *A Mini Guide to Shari'ah & Legal Maxims*, by Mohamad Akram Laldin (2009), in which there was also a chapter dealing with *qawā'id*.<sup>36</sup> Fifth, *Islamic Legal Maxims Based on al-Karkhi's al-Usul*, a translation of *Uṣūl al-Karkhī* (the first existing treatise on *qawā'id* exclusively) with a commentary by al-Nasafī (d. 537 / 1142), translated into English by Munir Ahmad Mughal (1998).<sup>37</sup> In addition, the whole of *Majallat al-Aḥkām al-Adliyyah* has also been translated into English by C. R. Tyser, D. G. Demetriades and Ismail Haqqi Effendi (1997) under the title of “*The Mejelle :- Majallah el-Ahkam-i-Adilya & a Complete Code on Islamic Civil Law*” (2007).<sup>38</sup>

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<sup>33</sup> Oneworld Publication, Oxford, 342 pages.

<sup>34</sup> Edinburgh University Press, Edinburgh, 178 pages.

<sup>35</sup> Brill, Leiden, 217 pages.

<sup>36</sup> CERT Publications, Kuala Lumpur, 154 pages.

<sup>37</sup> Kazi Publications, Lahore, 110 pages.

<sup>38</sup> The Other Press, Kuala Lumpur, 379 pages.

The fact, however, is that none of these works presents the genre of *qawā'id fiqhiyyah* comprehensively; instead, they provide general introductory information about the genre. This is also true, according to my own observations, with regard to the abovementioned academic works. As for al-Amiri's thesis, although it gives general background about the genre in terms of its significance, history, classifications and other important theoretical related topics,<sup>39</sup> it does not, generally speaking, focus on the application of *qawā'id* – especially on contemporary issues. It does not also present detailed discussion and analysis about the five universal *qawā'id* which are considered, including their subsidiaries, the most important in the whole discipline, and are seen as representative of the entire field, so much so that other *qawā'id* are seen as a commentary on them.<sup>40</sup> The thesis of Luqman Zakariyah presented a brief discussion of different topics, yet the main concern was confined to analyze six universal legal maxims<sup>41</sup> and their sub-maxims in relation to Islamic criminal law theoretically and empirically.<sup>42</sup> Intisar Rabb's work, on the other hand, although it examines the history, function, and debates surrounding *al-qawā'id al-fiqhiyya* and concepts of doubt and ambiguity in Islamic law, it "focuses on *qawā'id* of criminal law that place certain limitations on the definition and imposition of criminal sanctions and—by extension—the reach of legitimate political authority... and the role of the jurists in constructing and defining doubt

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<sup>39</sup> See: al-Amiri, *Legal Maxims*, Abstract, pp. II-III.

<sup>40</sup> Kamali, *Shari'ah Law*, 141.

<sup>41</sup> It will be stated in the third chapters that scholars from the different schools of law have agreed upon five *qawā'id* as the most comprehensive amongst the whole body of *qawā'id*. However, some scholars suggested other *qawā'id* to be in the same rank, yet the suggestions did not gain support.

<sup>42</sup> Luqman Zakariyah, *Applications of Legal Maxims in Islamic Criminal Law with Special Reference to Shari'ah Law in Northern Nigeria (1999-2007)*, a PhD thesis submitted to the University of Wales, Lampeter in 2009, from the abstract, page i.

together with the institutional, societal, and / or moral values that motivated them to do so”.<sup>43</sup>

### I.3. AIM AND STRUCTURE OF THE THESIS.

Thus, because there still exists a huge gap in the field and a need for an intensive and in depth study of the genre in English, or as expressed by Hashim Kamali: there is a lacuna that cries to be filled,<sup>44</sup> I chose to write on this discipline in a more comprehensive manner. The aim is to fill the lacuna, and hopefully be the first work in English, which discusses and analyzes the whole subject theoretically and practically. It is intended to be an essential academic source on *qawā'id* for English speaking readers in general and students at particular institutions.

The study will be presented in an introduction, five chapters and a conclusion, as follows:

In the introduction, I will mention the importance of the research subject, the literature review, the aim and the structure of the thesis, the methodology and other related subjects.

The first chapter will be an introductory chapter, stating many of the preliminary components in this context. This will include: the definition of *qawā'id*, their functions, classifications, features and characteristics, sources and differences between them and other disciplines of *fiqhī* thought, such as: *al-qawā'id al-uṣūliyyah* (maxims of legal theory), *al-ashbāh wal-naẓā'ir* (similitudes and resemblances), *al-furūq* (cases in the

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<sup>43</sup> See: Intisar Rabb, PhD, *Doubt's Benefit: Legal Maxims in Islamic law, 7th-16th Centuries*, at: ([http://works.bepress.com/intisar\\_rabb/12/](http://works.bepress.com/intisar_rabb/12/)).

<sup>44</sup> Kamali "Legal Maxims", 77.

law whose appearances resemble each other, but their legal statuses are different) and *al-naẓariyyāt al-fiqhiyyah* (the general theories of *fiqh*). Examples will always be given for the purpose of illustrating the stated issues.

The second chapter will be dedicated to the historical origins and development of *al-qawā'id al-fiqhiyyah*. Its aim is to trace the history of *qawā'id* from the time when they were just a legal phenomenon to the time when they become a distinct genre. This will cover the period from the first *Hijrī* century / seventh AC until the present time. The presentation will also include, as a significant part, detailed analytical comment on the most used and renowned works on *qawā'id* in the form of a chronological bibliography.

The third chapter will be on the so-called *al-qawā'id al-khams al-kubrā* (the five universal maxims) or *al-qawā'id al-fiqhiyyah al-aṣliyyah* (the normative legal maxims) which, according to many jurists, apply to the entire range of *fiqh* without specification, and over which the four Sunni *Madhāhib* (schools) are generally in agreement.<sup>45</sup> They are as follows: 1. *Al-umūr bi-maqāṣidihā* (matters are judged in light of the intention behind them); 2. *al-ḍarar yuzāl* (harm must be eliminated); 3. *Al-mashaqqah tajlib al-taysīr* (hardship begets facility); 4. *al-yaqīn lā yazūl bi-l-shakk* (certainty is not overruled by doubt); 5. *Al-ʿādah muḥakkamah* (custom can be the basis of judgment).<sup>46</sup> Each will be stated and explained in detail, including: general meaning, sources, subsidiary and supplemented maxims, examples and applications.

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<sup>45</sup> Kamali, *Shari'ah Law*, 141.

<sup>46</sup> See: Al-Suyūṭī, *al-Ashbāh*, 7.



The fourth chapter will be dealing with *al-qawā'id al-kulliyyah*, i.e. *qawā'id* that are applicable to many particulars from various chapters, yet they are of less comprehensiveness and scope of application than the five universal *qawā'id*. Discussion will focus on their position and importance in *fiqhī* thought. Examination will be made of selected *qawā'id* in the areas of speech interpretation, liability and compensation, and proof and evidence.

The final chapter will be practical, as it aims to introduce the applied aspect of *qawā'id* through examining their use in deducing legal rulings for contemporary medicine. In this regard, six medical issues have been selected as case studies; namely: 1. the profession of medical practice; 2. abortion; 3. organ donation; 4. anesthetization; 5. plastic surgery; and 6. repairing a ruptured hymen. The legislative position of *qawā'id* and the argumentation about this subject will also be discussed in this chapter.

In the conclusion, I presented a summary of the whole thesis in a few points, with some necessary explanation.

I have chosen to write about medical issues in particular because, to my knowledge, no academic work as a whole or even a part of it, both in Arabic or English, has been devoted to discuss the application of *qawā'id* to medical issues exclusively. With regard to essays, there are very few articles written in this regard, most of which were presented in a seminar in Riyadh in 2008 entitled as *Nadwat Tatbīq al-Qawā'id al-Fiqhiyyah 'Alā al-Masā'il al-Ṭibbiyyah* (a seminar for the application of *qawā'id fiqhiyyah* to medical issues), yet they have not been published.<sup>47</sup> In contrast, much concern has been given to application of *qawā'id* to modern financial issues.

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<sup>47</sup> The seminar was sponsored by the Department of the Religious Awareness, which relates to the municipality of Riyadh, Saudi Arabia in 1429 A.H. (2008).

At least three Masters theses and two PhD dissertations have been submitted to universities in Egypt, Jordan and Saudi Arabia dealing with application of *qawā'id* to financial transactions and contracts.<sup>48</sup> Furthermore, a large number of international conference papers<sup>49</sup> and journal essays<sup>50</sup> were exclusively on this topic. As with regard to other than medical issues, such as issues in modern politics, education, etc., which may not be seen to be treated broadly, I would recommend that other post graduate students in the field of *fiqhī* studies work on such topics and try to participate in providing parallel treatment to different fields and areas of life.

On the other hand, the six issues were not randomly selected; rather, they have been carefully and intentionally chosen for some reasons;

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<sup>48</sup> The Masters theses are: 1. *Al-Qawā'id al-Fiqhiyyah al-Munazzimah Lil-Mu'āmalāt al-Māliyyah al-Islāmiyyah* by 'Aṭiyyah 'Adlān Ramḍān, submitted to Alexandria University in 2006, (published in Alexandria by Dār al-Īmān in 2007). 2. *Al-Taṭbīqāt al-Fiqhiyyah li-Qā'idat al-Yasīr Mughtafar fil-Buyū'* by Hākyā Bin Muhammad Kārunitsh, submitted to Imam Muhammad Ibn Saud University in Riyadh in 1429, 2009, (unpublished). See: (<http://iefpedia.com/arab/?p=7075>). 3. *Al-Qawā'id al-Fiqhiyyah al-Muta'alliqah bil-Shurūṭ al-Fāsīdah wa-Taṭbīqātuhā fil-Quqūd*, by Muhammad al-'Abdalī, submitted to Imam Muhammad Ibn Saud University in Riyadh in 1429, 2009, (unpublished)). See: (<http://iefpedia.com/arab/?p=28005>). The PhD dissertations are: 1. *Al-Qawā'id wal-Dawābiṭ al-Fiqhiyyah li-Iḥkām al-Mabī'*, by Abdul-Majīd Dayyah, submitted to the Jordanian university in 2004, (published in Amman by Dār al-Nafā'is in 2005) . 2. *Al-Qawā'id al-Kulliyyah al-Kubrā wa-Atharuhī fil-Mu'āmalāt*, by Omar Kāmil, submitted to al-Azhar University in 2009, (published in Cairo by Dār al-Kutubī, in 2010).

<sup>49</sup> A number of papers on the subject were presented in a conference held at the University of Ghardaya in Algeria in February 2011 discussing Islamic economics, under the title of: *al-Multaqā al-Dawlī: al-Iqtisād al-Islāmī: al-Wāqī' wa-Rihānāt al-Mustaqbal*. Amongst them are: 1. *al-Dawābiṭ wal-Qawā'id al-Shar'iyyah lil-Mu'āmalāt al-Māliyyah al-Mu'āsirah*, by Ismā'īl Khālīdī. See: (<http://iefpedia.com/arab/?p=25065>). 2. *Al-Qawā'id al-Fiqhiyyah wa-Atharuhā fil-Mu'āmalāt al-Māliyyah: Nazariyyat al-Zurūf al-Tāri'ah*, by Mahmūd Mhaidāt. See: (<http://iefpedia.com/arab/?p=25106>). 3. *Qawā'id al-Si'ah wal-Murūnah wa-Taṭbīqātuhā al-Iqtisādiyyah*, by Anas Ghbāriyyah. See: (<http://iefpedia.com/arab/?p=25404>).

<sup>50</sup> For Example: 1. *Qā'idat al-Ghārr Dāmin wa-Taṭbīqātuhā al-Fiqhiyyah*, by Jamīl al-Khalaf, in: (Majallat al-'Adl, Riyadh, No. 42, 1430 A. H.), pp. 88-152. 2. *Qā'idat al-Jawāz al-Shar'ī Yunāfi al-Damān wa-Taṭbīqātuhā fil-Fiqh al-Islāmī wal-Qānūn*, in: (Jordan Journal of Islamic Studies, Amman, Vol. 2, No. 4, 2006), essay No.245. See: ([http://web2.aabu.edu.jo/Islamic/index.jsp?site\\_no=100060&art\\_id=245&islam\\_dtl=true](http://web2.aabu.edu.jo/Islamic/index.jsp?site_no=100060&art_id=245&islam_dtl=true)). 3. *Qā'idat al-Darūrāt Tubīh al-Mahḍūrāt wa-Taṭbīqātuhā fil-Fiqh al-Islāmī*, by Ḥasan Khaṭṭab, in (Majallat al-Uṣūl wal-Nawāzil, Jeddah, No. 2, 1430 A. H.), pp. 145-136.

amongst which, and the most important are the following three. First, they are from the sort of issues which are usually referred to in *fiqh* as: *mā taʿummu bihi al-balwā*, that is: the issues which continued to be problematic and of general concern to the community or a segment thereof. Second, although some of them are not contemporary issues in a sense that they were not dealt with in the past, some states and circumstances associated with them need to receive new consideration, in order to be given proper legal determinations. For example, the profession of medical practice (which is from the selected issues) is not a contemporary issue, because physicians are always there. Yet, there are some circumstances pertaining to this profession, which rarely happened in the past, but are of usual occurrence in the present time; consequently, these need to be examined separately in order to provide them, as mentioned earlier, with the proper legal ruling. For example, jurists have held detailed discussion on whether a male doctor can treat a female patient and vice versa or not. According to the majority of the jurists, a female patient is not to be treated by a male doctor in the availability of a female doctor, and equivalently a male patient is not to be treated by a female doctor in the availability of a male doctor. But in our time, a doctor, according to hospital laws, cannot refuse to see certain patients just because of their gender, unless female doctors choose to work in branches like obstetrics and gynaecology or paediatrics. Third, some of the issues, although medical, have social and cultural impacts. As such, abortion and repairing a ruptured hymen in cases of illicit sex have social dimensions related to the reputation of the families of the concerned ladies and girls.

#### I.4. METHODOLOGY.

Although most of the references are in Arabic, the dissertation is not a summary and translation of what has been presented in these works. Instead, it intends to present an analytical and descriptive study, and to view the existence of this branch of legal literature critically and historically.

The lack of availability of studies on *al-qawā'id al-fiqhiyyah* in English demands presenting the subject synthetically in a way which exposes the whole components of the discipline in order to create a general picture. This requires collecting much information on the subject from different sources. Although primary sources (traditional works on *qawā'id* in our case) are essential in eliciting information, contemporary works are also very valued. Accordingly, the reader of the thesis may find a variety of references in the footnotes of a single page whose authors belong to different ages, which signifies the endeavor to make the treatment as complete as possible.

One should, however, acknowledge that adopting the synthetic approach in this thesis has resulted significantly in missing a detailed mention of the distinctive contribution of individuals to *qawā'id* in specific sections. Although there are frequent references to the thoughts and views of various writers, none has been focused on to present their contributions exclusively in detail. The analytical comments on some renowned works on *qawā'id* in the second chapter (which deals with the history of the discipline), however, highlight some of the individuals' contributions. Nevertheless, they are still just hints. However, referring to the general

aim of the thesis, this work is intended to act as a starting point, and hopefully the catalyst for other future works in English, which can present such contributions exclusively, in separate theses.

The synthetic approach does not, however, mean mere description. Rather, the thesis comprises analysing data, making comparisons of many different concepts, discussing many of the different views critically, and viewing the subject historically, in addition to describing the treatment of the subject by other researchers. In this regard, acceptance or denial of some writers' views, criticism or description is in line with this methodology.

Every chapter will start with an introduction to the subject of that chapter, where the focus will be on the relationship between the subject and the whole thesis on the one hand, and with the *fiqhī* thought in general, on the other. This will be followed by discussing the related essential components, including definitions, classifications, functions, sources, etc. Examples will always be given for more illustration of the point under research. It worth mentioning that I adopted both the *Hijrī* and Christian Gregorian calendar when mentioning the year the scholars, mentioned throughout the thesis, died.

As for the last chapter, the main purpose is to expose the usage of *al-qawā'id al-fiqhiyyah* by contemporary scholars and researchers to conclude legal statuses for a number of selected novel medical issues. I have also mentioned some of the argumentation of the different parties regarding some of these issues when applicable. While presenting each of the issues, I have stated my own critical observations and discussions, intending to make some contribution in this regard.

For the translation of *qawā'id*, I depended mainly on the following:

1. C. A. Hooper, "The Mejlle. Articles 1-100", in: *Arab Law Quarterly*, Vol. 1, No. 4 (Brill, Lieden, Aug., 1986), pp. 373-379".
2. Translation of Farhat J. Ziyadeh to Şubhī Maḥmaṣṣānī's, *Falsafat al-Tashrī' al-Islāmī* (Brill, Leiden, 1961).
3. Mohammad Hashim Kamali, *Sharī'ah Law: an Introduction* (Oneworld Publications, Oxford, 2008).

However, in many cases, I translated the *qawā'id* myself, when there was no translation, or when I felt that the translation given was not proper.

For the *Qur'ān* translation, I used al-Hilālī and Khan's translation: *Translation of the Meanings of the Noble Qur'ān in the English Language*, (Medina: King Fahd Complex for the Printing of the Holy *Qurān*, 1417 / 1997).

As for the system of transliteration, I followed the one used by the Encyclopaedia of Islam, and some well-known journals, such as the International Journal of Middle East Studies (IJMES).

# **CHAPTER ONE**

## **PRELIMINARY COMPONENTS**

## CHAPTER ONE

### PRELIMINARY COMPONENTS

#### 1.1. MEANING OF *QAWĀ'ID*.

##### 1.1.1. Lexical Meaning.

Lexically, *qawā'id* is the plural form of the word *qā'idah*, which has many lexical meanings in Arabic, denoting foundation, stability, firmness.<sup>1</sup> In the *Qur'ān*, the plural form (i.e. *qawā'id*) was mentioned in three places; two of which were used to mean foundations,<sup>2</sup> whereas the third refers to women who are past child-bearing age<sup>3</sup>. In contrast, there is no mention of the singular form (i.e. *qā'idah*) in any place in the *Qur'ān*. As a term, the word *qā'idah* is synonymous with the terms of base, principle, maxim and the like, and is used as such in different contexts, religious, philosophical, political or legal.<sup>4</sup>

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<sup>1</sup> As mentioned above, *qawā'id* is the plural form of *qā'idah*, which is the feminine active participle of the verb (*qa-ʿa-da*). The verb basically means to stay and to sit down. The verb is also used in other contexts as well, although all of its meanings denote the sense of firmness, constancy, solidity and durability. *Qa'adat al-fasīlah* means the palm shoot became firm on the ground when it developed a strong trunk. The crippled person who is unable to walk or move properly is called *muq'ad*. *Qā'idah*, in this context, means a foundation, and *qawā'id al-bayt* are the foundations of a house. See for the lexical meanings of the word *qā'idah*: Ibn Manẓūr, *Lisān al-ʿArab* (Beirut: Dār Ṣādir, 1968), S.V: *qa ʿa da*. Al-Jawharī, *al-Sihāh*, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1999), S.V: *qa ʿa da*. See also: Al-Qurṭubī, *al-Jāmiʿ li-Aḥkām al-Qur'ān*, (Cairo: Dār al-Kitāb al-ʿArabī, 1967), 12:309. Abū Ḥayyān, *al-Baḥr al-Muḥīṭ*, Second Edition, (Beirut: Dār al-Fikr, 1983), 6:473.

<sup>2</sup> *Sūrat al-Baqarah*, 127; *Sūrat al-Naḥl*, 26.

<sup>3</sup> *Sūrat al-Nūr*, 60.

<sup>4</sup> Al-Nadwī, *al-Qawā'id al-Fiqhiyyah*, 41. See also: Luqman Zakariyah, *Applications of Legal Maxims*, 26.



### 1.1.2. Technical Meaning.

Technically, up to the eighth *Hijrī* century, jurists did not provide a definition for the term (*qā'idah*), which reflects the *fiqhī* perspective for the notion. Rather, they seem to adopt and endorse definitions provided by some authors, who specialized in terminology, for the term in general, which can be borrowed for the rules of many disciplines. For example, al-Jurjānī (d. 816 / 1413) in his *al-Ta'rifāt* defines the term *qā'idah* as: "a comprehensive principle or law that is applicable to all of its particulars".<sup>5</sup> The first jurist, however, who provided a definition was Tāj al-Dīn ibn al-Subkī (d. 771 / 1370). His definition is as follows: "a comprehensively valid rule which applies to many particulars, so that their legal determinations can be comprehended from it".<sup>6</sup>

Jurists were not in agreement over the extent of application of *al-qawā'id al-fiqhiyyah* over their particulars. The majority thought that they are similar to the rules of other disciplines, such as *uṣūl al-fiqh* (legal theory), *kalām* (theology), *manṭiq* (logic), *naḥw* (grammar), etc., in terms of being comprehensively applicable to their particulars without exception. Some *fuqahā'* on the other hand, believed that *al-qawā'id al-fiqhiyyah* are only *ḥukm aghlabī* (predominantly valid rules) rather than comprehensive.<sup>7</sup> In this context, al-Ḥamawī (d. 1098 / 1687) says: "*qā'idah* according to *fuqahā'* is different from that of grammarians and legal theorists.

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<sup>5</sup> Al-Sharīf al-Jurjānī, *al-Ta'rifāt*, First Edition, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1983), 171.

<sup>6</sup> Tāj al-Dīn al-Subkī, *al-Ashbāh wal-Nazāʾir*, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1991), 1:11.

<sup>7</sup> As in the case of al-Ḥamawī (d. 1098 / 1687) and al-Zurqānī al-Mālikī (d. 1099 / 1688) and some contemporary scholars, such as Mustafā al-Zarqā. See: Nāṣir al-Maymān, *al-Qawā'id wal-Dawābiṭ al-Fiqhiyyah ʿInda Ibn Taymiyyah*, Second Edition, (Makkah: Umm al-Qurā University, 2005), 122.

According to them, it is a predominant principle, rather than comprehensive..."<sup>8</sup>. It is also said: "it is known that the *qawā'id al-fiqh* are predominant".<sup>9</sup>

This disagreement among jurists was reflected in the definitions they provided for *al-qā'idah al-fiqhiyyah*. The majority adopted definitions given to the term *qā'idah* in general (such as the abovementioned definition of al-Jujānī), on the grounds that a *qā'idah fiqhiyyah* is also applicable to its particulars either without or with a small amount of exception. Whereas for the other group of jurists, they provided definitions to reflect their own thought. Al-Ḥamawī in *Ghamz 'Uyūn al-Baṣā'ir*, for example, defined the *qā'idah fiqhiyyah* as: "a general principle that is applicable to most of its particulars".<sup>10</sup>

The main reason behind these divergent views is seemingly the impact of the particulars, which are excluded from the application of many *qawā'id* on the nature of *al-qawā'id* as a whole. While those who say that *qawā'id* are predominant in their applications gave these exceptions considered account, and defined the *qā'idah fiqhiyyah* accordingly, the majority of jurists did not. They basically considered the general meaning of the *qā'idah*, perceiving no difference between rules of other disciplines and rules from the *fiqhī* point of view.<sup>11</sup> As for the circumstances and problems, which are excluded from the application of many *qawā'id*, they provided the following arguments:

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<sup>8</sup> Shihāb al-Dīn al-Ḥamawī, *Ghamz 'Uyūn al-Baṣā'ir*, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1985), 1:51.

<sup>9</sup> See: Muhammad Ali al-Mālikī, *Tahdhīb al-Furūq*, (Beirut: ʿĀlam al-Kutub, nd), 1:36.

<sup>10</sup> Al-Ḥamawī, *Ghamz*, 1:51.

<sup>11</sup> Muhammad Ṣidqī al-Būrnū, *Mawsūʿat al-Qawā'id al-Fiqhiyyah*, (Beirut: Muʾassasat al-Risālah), 1:22. ʿAbd al-Majīd al-Jazāʿirī, *al-Qawā'id al-Fiqhiyyah al-Mustakhrajah Min Kitāb Iʿlam al-Muwaqqiʿin*, (Riyadh: Dār Ibn al-Qayyim, nd), 162.

Firstly, comprehensiveness is one of the basic characteristics of any rules in any discipline.<sup>12</sup> *Qawā'id al-fiqh*, in this regard, are no exception.

Secondly, excluding a single matter or problem does not invalidate or put into question the comprehensiveness of the *qā'idah*.<sup>13</sup>

Thirdly, the excluded matters might not originally meet the conditions of the *qā'idah*, and thus not be considered exceptions to the comprehensive nature of the *qā'idah* in the first place.<sup>14</sup>

Fourthly, it is a general phenomenon in all disciplines that a single matter might be excluded from a *qā'idah*, and this by no means restricts or nullifies its comprehensiveness.<sup>15</sup>

Fifthly, an excluded problem from a particular *qā'idah* might be included in another *qā'idah*.<sup>16</sup> As a result, all particulars are eventually included within the framework of *qawā'id*. It is stated in the introduction of *Majallat al-Aḥkām al-Adliyyah* that: "Although a few of them (i.e. *al-qawā'id al-fiqhiyyah*), if to be taken alone, admit of certain exceptions, their general application is in no way invalidated thereby, because they are closely interrelated".<sup>17</sup>

Sixthly, the exempted particulars of a *qā'idah* do not form a second general rule in opposition to the first.<sup>18</sup>

Attempting to consider the points of view of both parties, some scholars provided definitions for the *qawā'id fiqhiyyah* stating that they

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<sup>12</sup> Ibn al-Najjār, *Sharḥ al-Kawkab al-Munīr*, Muhammad al-Zuḥaylī & Nazīh Ḥammād (ed), (Damascus: Dār al-Fikr, 1980), 1:45.

<sup>13</sup> Abū Ishāq al-Shāṭibī, *al-Muwāfaqāt*, (Cairo: Dār al-Fikr al-ʿArabī, nd), pp. 2:52-53.

<sup>14</sup> Ibid.

<sup>15</sup> Al-Nadwī, *al-Qawā'id*, 44.

<sup>16</sup> Al-Bürnū, *Mawsūʿat*, 1:24. Al-Jazāʿirī, *al-Qawā'id*, 163.

<sup>17</sup> ʿAlī Ḥaydar, *Durar al-Ḥukkam Sharḥ Majallat al-Aḥkām*, Translation of Fahmī al-Ḥusaynī, (Beirut: Dār al-Kutub al-ʿIlmiyyah, nd), 1:15.

<sup>18</sup> Al-Shāṭibī, *al-Muwāfaqāt*, 2: 53. See also: Wolfhart, "Qawā'id as a Genre of Legal Literature", p. 368.

are either comprehensively or predominantly applicable to their particulars. Salim Rustum, in his comments on *Majallat al-Aḥkām* defined the *qāʿidah fiqhiyyah* as: “a principle which is comprehensive or applicable to the most, the objective of which is to know the legal determination of the particulars”.<sup>19</sup> On the other hand, Muṣṭafa al-Kūẓḥaṣārī (d. 1215 / 1800), a Ḥanafī scholar, in his *Manāfiʿ al-Daqāʿiq* says that a *qāʿidah* in *fiqh* is more general than comprehensive or just predominant.<sup>20</sup> He did not provide further explanation of his view.

Many authors of recent works on *qawāʿid* have recorded some observations about the definitions given to this concept by the traditional *fuqahāʾ*. They attempted, instead, to provide alternative definitions that they thought to be more precise and comprehensive.<sup>21</sup> However, one may note that some authors have shown exaggeration in dealing with the definitions, and in attempting to provide new ones. In a number of cases, authors may spend five or six pages mentioning the definitions of some traditional jurists and their observations and notes on them, and providing their own definitions, which are seemingly a mere paraphrasing of the definitions they criticized.<sup>22</sup> Riyāḍ al-Khalifī, a contemporary researcher, mentioned a case where the author spent 44 pages in stating and criticizing the definitions of other researchers.<sup>23</sup>

<sup>19</sup> Salīm Rustum, *Sharḥ al-Majallah*, (Beirut: Dār al-Kutub al-ʿIlmiyyah, nd), Chapter I.

<sup>20</sup> Mustafa Al-Kūẓḥaṣārī, *Manāfiʿ al-Daqāʿiq Sharḥ Majmaʿ al-Ḥaqāʾiq*, (Cairo: al-Maṭbaʿah al-ʿĀmirah, 1288 A.H), 305.

<sup>21</sup> See: al-Nadawī, *al-Qawāʿid*, pp. 43-45. Muhammad Al-Rugī, *Qawāʿid al-Fiqh al-Islāmī Min Khilāl Kitāb al-Ishrāf ʿAlā Masāʾil al-Khilāf*, (Damascus: Dār al-Qalam, 1998), pp. 107-109. Muhammad al-Sharīf, (ed), *al-Majmūʿ al-Mudhhib Fī Qawāʿid al-Madhhab*, (Kuwait: Wazārat al-Awqāf, 1994), 38.

<sup>22</sup> Muhammad al-Rūgī, *Nazarīyyat al-Taḳīd al-Fiqhī*, (Rabat: Muhammad V University - Kulīyyat al-Ādāb wal-ʿUlūm al-Insāniyyah, 1994), pp. 42-46.

<sup>23</sup> Riyāḍ Al-Khalifī, *al-Qawāʿid al-Fiqhiyyah: Ḥujjiyyatuhā wa-Ḍawābiṭ al-Istidlāl Bihā*, 290.

Nevertheless, some researchers provided some good definitions, which were widely quoted. Muṣṭafā al-Zarqā (1998), for example, defined *qawā'id* as: “general *fiqh* principles which are presented in a simple format, consisting of general legal rulings of the particulars related to it”.<sup>24</sup> Furthermore, some writers presented critical argumentations with regard to the definitions given to *al-qawā'id al-fiqhiyyah* which seem to be valued. For example, Ya'qūb al-Bāḥusayn in his *al-Qawā'id al-Fiqhiyyah* (1998) observed that many of the definitions provided for *al-qawā'id al-fiqhiyyah* are not confined to *qawā'id* exclusively. According to him, these definitions are also valid for what he described as *al-aḥkām al-fiqhiyyah al-juz'iyyah al-ʿāmmah al-mujarradah* (common abstract legal rulings), as they are also comprehensive rules or principles. For example, the ruling which says: “breaking fast intentionally in *Ramaḍān* requires *qadā'* and *kaffārah*” (making up the days by fasting alternative days besides making *kaffārah* as an expiation of the sin - by fasting sixty days for each single day or feeding sixty poor people). According to al-Bāḥusayn, although this is a particular, it can also be a comprehensive rule, because legal determination of many smaller particulars can be understood from it, and can consequently be included within the definitions given to *al-qā'idah al-fiqhiyyah*. Therefore, he suggested a definition for the *qā'idah fiqhiyyah*, which he thought more proper. He says: “a *qā'idah* is a comprehensive rule whose particulars are also comprehensive rules”. According to him, this definition distinguishes clearly between *al-qawā'id al-fiqhiyyah* and *al-aḥkām al-fiqhiyyah al-juz'iyyah*, for the particulars of the latter category are the individual

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<sup>24</sup> Muṣṭafā al-Zarqā, *al-Madkhal*. The translation of the definition was taken from: Mohamad Laldin, *A Mini Guide To Saī'ah and Legal Maxims*, Second Print, (Kuala Lumpur, CERT, 2009), 94.

figures, i.e. Zayd, ʿAmr, Ali ..etc, whereas for the former category the particulars are *al-aḥkām al-farʿiyyah*.<sup>25</sup>

## 1.2. TYPES OF *AL-QAWĀʿID AL-FIQHIYYAH*

*Al-qawāʿid al-fiqhiyyah* are not of one type, nor are they in one level of importance in the *fiqhī* thought; rather, they vary according to several aspects. However, the considerations which the authors on *qawāʿid* have presented are many in this context. Yet, perhaps the most important amongst them are three; namely: scope of application, being agreed upon or not, and being independent or subsidiaries.<sup>26</sup> The following is a detailed section on these classifications.

1.2.1. First, with respect to the scope of application, *qawāʿid* can be classified into three categories as follows:

1.2.1.1. *Qawāʿid* which are thought to apply to all chapters of *fiqh* without specification. There are five major *qawāʿid* under this category known as *al-qawāʿid al-khams al-kubrā* (the five major / universal maxims). It is said that the whole *fiqh* is based on these *qawāʿid*, and the essence of the *Shariʿah* as a whole is grasped between them, and the rest of the *qawāʿid* are simply an elaboration of them.<sup>27</sup> These *qawāʿid* are as follows:

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<sup>25</sup> Al-Bāḥusayn, *al-Qawāʿid* pp. 54-55. Yaʿqūb al-Bāḥusayn, *al-Maʿayir al-Jaliyyah*, (Riyadh: Maktabat al-Rushd, 2006), 40.

<sup>26</sup> Muhammad al-Zuhaylī, , *al-Qawāʿid al-Fiqhiyyah wa Taṭbīqātuhā fī-l-Madhāhib al-Arbaʿah*, (Damascus: Dār al-Fikr, 2006), pp. 31-33. Al-Bāḥusayn: *al-Qawāʿid*, pp. 118-132. Al-Burnū: *Mawsūʿat*, pp. 32-36. Al-Jazāʾirī, *al-Qawāʿid*, pp. 194-198. See also the Introduction of Ahmad Bin Ḥumayd (ed), *al-Qawāʿid* of al-Maqqarī al-Mālikī, (Mecca: Jāmiʿat Umm al-Qurā: Markaz Ihyaʾ al-Turāth al-Islāmī, 1996), pp. 110-112.

<sup>27</sup> Al-Suyūṭī, *al-Ashbāh*, 4. Al-Zuhaylī, *al-Qawāʿid*, 32.

1. *Al-umūru bi-maqāṣidihā* (Acts are judged by the intention behind them).
2. *Al-dararu yuzāl* (Harm must be eliminated).
3. *Al-yaqīnu lā yazūlu bil-shakk* (Certainty is not overruled by doubt).
4. *Al-mashaqqatu tajlibu al-taysīr* (Hardship begets facility).
5. *Al-ādatu muḥakkamah* (Custom can be the basis of judgment).<sup>28</sup>

Chapter three of this thesis will be fully dedicated to discuss in detail most of the research points relate to these five maxims.

1.2.1.2. *Qawā'id* that apply to many chapters of *fiqh*, yet they are not as comprehensive in their application as the five major maxims. Al-Subkī called this type: *al-qawā'id al-āmmah* (the general maxims), whereas al-Suyūṭī and ibn Nujaym called them: *kulliyyāt* (comprehensive) that apply to limitless particulars.<sup>29</sup> Al-Subkī mentioned twenty-six *qawā'id* under this category, while al-Suyūṭī raised the number to forty. Ibn Nujaym, apparently considering the Ḥanafī school of law only, counted only nineteen.<sup>30</sup> Examples of these are: 1. *i'mālu al-kalāmi awlā min ihmālihi* (a word should be construed as having some meaning, rather than passed over in silence). 2. *al-kharāju bi-l-ḍamān* (gain accompanies liability for loss). 3. *Mā ḥaruma fī'luhu ḥaruma ṭalabuhu* (when it is forbidden to perform an act it is also forbidden to request its performance). 4. *al-Tābi' tābi'* (an accessory which is attached to an object in reality is also attached to it in law).

<sup>28</sup> Al-Subkī, *al-Ashbāh*, 1:12. Al-Ḥiṣnī, *Kitāb al-Qawā'id*, ed. °Abd al-Raḥmān al-Sha'ālān, First Edition, (Riyadh: Maktabat al-Rushd, 1997), pp: 1:203-207. Al-Suyūṭī, *al-Ashbāh*, 118. Al-Sadlān, *al-Qawā'id al-Fiqhiyyah al-Kubrā*, 9.

<sup>29</sup> Al-Subkī, *al-Ashbāh*, 1:94. Al-Suyūṭī, *al-Ashbāh*, 4. Ibn Nujaym al-Miṣrī, *al-Ashbāh*, 4.

<sup>30</sup> Al-Bāḥusayn: *al-Qawā'id*, 119. Al-Jazā'irī, *al-Qawā'id*, 195.

Chapter four of this thesis will be completely dedicated to discuss this type of *qawā'id*.

1.2.1.3. *Qawā'id* which are abstractions of the rules of *fiqh* on specific themes and chapters, such as the chapters of prayer, fasting, marriage, etc. This kind of *qawā'id* is called *ḍawābiṭ* (controllers).<sup>31</sup> Examples of *ḍawābiṭ* are: 1. *kull maytatin najisatun illā al-samak wa-l-jarād* (all the dead animals are impure except fish and locusts). 2. *kullu ḥayyin ṭāhirun* (every living thing is pure). 3. *al-mar'u mu'ākhadhun bi-iqrārihi* (a person is bound by his own admission). 4. *al-ḥudūdu tudra'u bi-l-shubuhāt* (the punishments of *ḥudūd* will not be imposed when there is a doubt).<sup>32</sup> What is worth mentioning in this context is that al-Subkī in some places of his *Ashbāh wal-Naẓā'ir* called this kind of *qawā'id*: *al-qawā'id al-khāṣṣah* (the special *qawā'id*).<sup>33</sup>

1.2.2. Second, with respect to them being agreed upon or not, *qawā'id* are of two categories:

1.2.2.1. Agreed upon *qawā'id*. This refers to the *Qawā'id*, which the schools of law are in agreement over, regardless of the various opinions with respect to their application to certain issues. This category includes, in the first place, the abovementioned five major *qawā'id*, and also includes many of the *qawā'id* which al-Suyūṭī and Ibn Nujaym described, as mentioned earlier, as *al-kulliyāt*.<sup>34</sup>

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<sup>31</sup> Al-Subkī, *al-Ashbāh wa*, 1:11.

<sup>32</sup> Al-Ṣādiq al-Ghiryānī, *Taṭbīqāt Qawā'id al-Fiqh 'Inda al-Mālikiyyah*, (Tripoli: Manshūrāt Jāmi'at al-Fātiḥ, 2007), 10. Al-Bāḥusayn: *al-Qawā'id al-Fiqhiyyah*: 124.

<sup>33</sup> Al-Subkī, *al-Ashbāh*, 1: 200.

<sup>34</sup> Al-Zuhaylī, *al-Qawā'id*, 32. Al-Būrnū, *Mawsū'at*, pp. 1:32-33.



1.2.2.2. *Qawā'id* which the schools of law are not in agreement upon. They are called *qawā'id al-khilāf*.<sup>35</sup> They in turn are also of two categories, as follows:

1.2.2.2.1. *Qawā'id* upon which scholars of a particular school are in agreement, yet they may be not as such in the other schools. Examples of these are: 1. *Al-ibratu fī-l-ʿuqūdi li-l-maqāṣidi wa al-maʿānī lā li-l-alfāẓi wa-l-mabānī* (in contracts effect is given to intention and meaning and not to words and forms). This *qā'idah* is not accepted according to the Shāfiʿī school of law, while it is so in the other three schools. 2. *al-ajru wa-l-ḍamānu lā yajtamiʿān* (remuneration and liability do not run together). This *qā'idah* is accepted only in the Ḥanafī school.<sup>36</sup>

1.2.2.2.2. *Qawā'id* upon which the scholars of even a particular school are not in agreement. They usually begin with a question word, which indicates the diversity of opinions regarding their consideration.<sup>37</sup> An example of this type is as follows: Mālikī scholars are not in agreement whether or not what often happens has the same legal ruling of what always happens. For example, they disagreed on the validity of the ablution (*wuḍūʿ*) if one uses the leftover water of an animal or a bird, which always uses and eats dirt, yet on that occasion dirt is not seen in its mouth. According to ibn Rushd (520 / 1126), an outstanding Mālikī scholar, water is still pure because every living being is pure, and because dirt was not seen in the bird's mouth; consequently *wuḍūʿ* is valid. Many other scholars, on the other hand, argued that water should not be used for *wuḍūʿ*, because such

<sup>35</sup> Bin Ḥumayd, (ed) *al-Qawā'id* of al-Maqqarī al-Mālikī: 1:111.

<sup>36</sup> Al-Jazāʿirī, *al-Qawā'id*, 198. Al-Bāḥusayn: *al-Qawā'id*, pp. 125-126. <sup>36</sup> Al-Zuhaylī, *al-Qawā'id al-Fiqhiyyah*, pp. 32-33.

<sup>37</sup> Bin Ḥumayd, Ahmad (ed) *al-Qawā'id* of al-Maqqarī al-Mālikī: 111. Al-Bāḥusayn: *al-Qawā'id*, 124. Al-Zuhaylī, *al-Qawā'id*, 33.

animals use dirt predominantly, and what is of predominant occurrence is equal legally to what happens invariably. For this disagreement among scholars on the legal rulings of such a problem and its like, a *qā'idah* has been coined implying the diversity of views. It says: *hal al-ghālib ka-l-muḥaqqaq?* (is what is of predominant occurrence equal legally to what occurs invariably?).<sup>38</sup>

1.2.3. Third, with respect to them being independent or mere subsidiary, *qawā'id* are also of two categories:

1.2.3.1. Independent *qawā'id*. This refers to the essential maxims, each of which has been coined to reflect a major legal idea.<sup>39</sup> The five major *qawā'id* are again examples of independent maxims. Other examples for this category are the following: 1. *i'mālu al-kalām awlā min ihmālih* (a word should be construed as having some meaning, rather than being disregarded). 2. *al-kharāju bil-ḍamān* (the enjoyment of a thing is the compensating factor for any liability attaching thereto). 3. *al-wilāyatu al-āmmah aqwā min al-wilāyati al-khāṣṣah* (Public trusteeship is more effective than private trusteeship).<sup>40</sup>

1.2.3.2. Subsidiary *qawā'id*. These are the principles, which were derived from more general principles to serve them in one of two approaches. First, to represent one of their aspects, i.e. to be the application of the general *qawā'id* to certain fields. For example, a *qa'idah* which stipulates that a matter recognized by custom among merchants is regarded as if stipulated by agreement: "*al-ma'rūfu bayna al-tujjāri kal-mashrūṭi baynahum*" - is actually an application in a certain field of the major maxim which reads:

<sup>38</sup> Al-Ghiryānī, *Taṭbīqāt*, 36. Al-Zuḥaylī, *al-Qawā'id*, 866.

<sup>39</sup> Al-Bāḥusayn: *al-Qawā'id*, 126.

<sup>40</sup> Ibid. 127.

*al-‘ādatu muḥakkamah* (custom can be the basis of judgment). Second, to be an exception, a condition or a provision within another *qā‘idah*. For example, a *qā‘idah* which says: *al-ḍararu lā yuzālu bi-mithlih* (a harm cannot be removed by a similar harm) is a provision within a universal *qā‘idah* which says: *al-ḍararu yuzāl* (harm must be eliminated).<sup>41</sup> On the other hand, a *qā‘idah* which reads *al-sukūtu ‘inda al-ḥājati bayan* (silence is tantamount to a statement where there is a necessity for speech) is an exception to another *qā‘idah* which stipulates that: no statement is imputed to a man who keeps silence: (*lā yunsabu ilā sākitin qawl*).

### 1.3. CRITERIA OF QAWĀ‘ID FORMATION.

Similar to the rules of other disciplines, there are specific criteria for the formation of *al-qawā‘id al-fiqhiyyah*. These criteria are theoretical conditions, which stand as the fundamental elements that exist for any *qā‘idah*, in order to be as such in the proper technical sense.<sup>42</sup>

None of the traditional works<sup>43</sup> had a discussion on this important research point in a scientific method in devoted sections, although some conditions for some particular *qawā‘id* individually are mentioned.<sup>44</sup> However, discussions on these criteria in the modern works of *qawā‘id* are also few. Among the many authors, only Muhammad al-Rūgī and Ya‘qūb

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<sup>41</sup> Ibid. 128.

<sup>42</sup> Al-Rūgī, *Nazarīyyat al-Taḳ‘īd*, 60. Al-Baḥusayn, *al-Qawā‘id*, 164.

<sup>43</sup> Traditional works in the whole thesis refer to all books, which were compiled before *Majallat al-Aḥkām al-‘Adliyyah*, i.e. before the mid-thirteenth /-nineteenth century.

<sup>44</sup> Al-Baḥusayn, *al-Qawā‘id*, 164.

al-Bāḥusayn have dedicated sections in their books to talk about this point in detail.<sup>45</sup> There is also a hint to some of them in some other works.<sup>46</sup>

Be that as it may, the main purpose of these criteria is to differentiate between what is a *qāʿidah* and what is a *ḥukm juzʿī* (a legal ruling of a single issue). Both types are basically legal rulings, yet the former is more general in that it comprises a number of the latter. However, because many legal rulings of individual cases are presented in general forms similar to those of *qawāʿid*, some authors of traditional books and some contemporary researchers (especially post graduate students who worked on collecting the scattered *qawāʿid* from the traditional books of *fiqh*) have in many cases confused the two concepts, counting as *qawāʿid* what are mere *aḥkām juzʿiyyah*.<sup>47</sup> For example, al-Suyūṭī in *al-Ashbāh wal-Naẓāʾir* said: “*qāʿidah: qāla al-Shāfiʿī: lā yukkfaru aḥadun min ahli al-qiblah*” (a maxim: al-Shāfiʿī said: none of the people of the *qiblah* (Muslims) is to be declared an unbeliever). Similarly, he said: “*qāʿidah: man ḥabasahu al-qādī lā yajūzu itlāquhu illā bi-riḍā khaṣmihī*” (a maxim: it is not permissible for he who has been imprisoned based on a judiciary verdict, to be freed without the permission of their opponent).<sup>48</sup> Both examples are basically legal rulings of individual cases; nevertheless, al-Suyūṭī labelled them as *qawāʿid*.

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<sup>45</sup> See: Al-Rūgī, *Naẓariyyat al-Taḳīd*, pp. 60-68. Al-Bāḥusayn, *al-Qawāʿid*, pp. 164-187.

<sup>46</sup> Amongst these works are: 1. The introduction to *al-Qawāʿid* of al-Maqqarī al-Mālikī by the editor Ahmad Bin Humayd (1.119); *Taṭbiqāt Qawāʿid al-Fiqh ʿInda al-Mālikiyyah*, by al-Ṣādiq al-Ghīriyānī (9); *Mawsūʿat al-Qawāʿid al-Fiqhiyyah* by Muhammad Ṣidqī al-Būrnū (1.29) and *al-Madkhal al-Fiqhī al-ʿĀmm* by Muṣṭafā al-Zarqā (2:965-966).

<sup>47</sup> Al-Bāḥusayn, *al-Maʿāyir al-Jaliyyah* pp. 5-6.

<sup>48</sup> Ibid., 111. See: al-Suyūṭī, *al-Ashbāh*, 516 and 519 respectively.

For this reason, attempts have been made to provide specific criteria for the formation of *qawā'id*. In this context, *Majma' al-Fiqh al-Islāmī* (the International Islamic Fiqh Academy)<sup>49</sup> launched a major academic project in 2000 to collect *qawā'id* from the main traditional books of *fiqh* of the four schools of law under the name of *Ma'lamat al-Qawā'id al-Fiqhiyyah* (the Major Encyclopedia for *Qawā'id Fiqhiyyah*). For the purpose of accomplishing this project in a scientific way, the *Majma'* established certain criteria and guidelines to be followed by the participants in this project, to facilitate the distinction between *qawā'id* and *aḥkām juz'īyyah*. The following are some examples.

1. *qawā'id* usually start with *maṣḍar* (a verbal noun). For example: “*murā'āt al-maqāsid muqaddamah 'alā ri'āyat al-wasā'il Abadan*” (consideration of goals must always have priority over consideration of means). Likewise, “*al-bay' al-ḥarām mardūd abadan*” (forbidden sales are always annulled);
2. they also start with conditional articles that imply general denotations. Examples: *idhā intafā al-sabab wa-āthāruh fa-yantafī al-ḥukm li-intifā'ih* (when a cause and its impacts disappear, the legal ruling which resulted from this very cause is automatically nullified); or
3. they start with a word that signifies a comprehensive legal ruling. Example: *lā yajūzu li-aḥadin an ya'khudha māla aḥadin bilā sababin*

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<sup>49</sup> The *Majma' al-Fiqh al-Islāmī* is one of the institutions which relates to the Organization of Islamic Cooperation (OIC) in Jeddah, KSA.

*sharʿiyyin* (it is not permissible for any person to take another person's property without legal cause).<sup>50</sup>

What is remarkable here is that these criteria are mainly linguistic, which take into consideration the broad meanings of certain words, clauses or articles. The *Majmaʿ*, accordingly, seems to adopt a practical methodology in order to facilitate achieving its project. However, according to Yaʿqūb al-Bāḥusayn, such guidelines cannot be criteria for the formation of *qawāʿid*, simply because each can also be applied to legal rulings of individual cases. For example, “*takhlīlu al-shaʿri sunnatun fī-l-ṭahārah wa-yukrahu lī-l-muḥrimī*” (combing hair with wet fingers is recommended while performing ablution, unless one is in the state of *iḥrām* in *ḥajj*, then it is disliked). Although it starts with a *maṣdar*, it is still a *ḥukm juzʿī*. Likewise, a statement such as: “*man dakhala al-masjida wal-imāmu yakḥṭubu lam yajlis*” (whoever enters a mosque while the imam was delivering the Friday ceremony should not sit down, i.e. he should pray *taḥiyyat al-masjid* – a prayer for greeting the mosque) is a mere legal ruling for individual cases although it starts with the article “*man*” (whoever) which implies general denotations.<sup>51</sup>

Muḥammad al-Rūgī (a contemporary jurist and professor of Islamic law from Morocco) in *Naẓariyyat al-Taḳīd al-Fiqhī* suggested four criteria for any legal ruling to be described as a *qāʿidah* in the technical sense. According to him, it must be comprehensive, continuous and free of break,

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<sup>50</sup> Al-Bāḥusayn, *al-Maʿayir*, pp. 28-29.

<sup>51</sup> Ibid., pp. 31-33.

abstract and concise.<sup>52</sup> For the purpose of more illustration, let us present and analyze his suggestion in this regard.

The first criterion he suggested is: *al-istī‘āb* (comprehensiveness). Accordingly, the content of the *qā‘idah* must be comprehensive, that is: to include and be applicable to a number of particulars from different chapters of *fiqh* that have common legal determinations.<sup>53</sup> He mentioned some well-known *qawā‘id* as examples, stating a number of cases after each, which fall under their remit. For example, one of the *qawā‘id* he cited is: “*dhikru mā-lā yatajazza‘u ka-dhikri kullihī* (a reference to a part of an indivisible thing is regarded as a reference to the whole), for which he cited the following cases: 1. divorce is valid if a husband made a reference to a part of his wife’s body, saying, for example: “half of you is divorced” or “one of your limbs is divorced”. Divorce is also valid if a husband declared a half or quarter divorce. This is because divorce is indivisible. 2. If a person made the intention to perform pilgrimage, but intended only half a pilgrimage, what he intended is null and he ought to perform it completely, as pilgrimage is indivisible. 3. If a father or a guardian of a homicide victim pardons part of the murderer for a fine, the latter will be officially forgiven and their punishment will be stopped,<sup>54</sup> as pardon is indivisible.<sup>55</sup>

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<sup>52</sup> Al-Rūgī, *Nazariyyat al-Taḳ‘īd* pp. 60-68.

<sup>53</sup> Al-Baḥṣayn, *al-Qawā‘id*, 171. Al-Rūgī, *Nazariyyat al-Taḳ‘īd*. 60.

<sup>54</sup> In Islamic criminal law, the death penalty is imposed on the murderer. This is called *qisās*. It cannot be altered or cancelled after the offender has been found guilty based on sufficient evidence, unless the family of the victim pardons him or asks for compensation (*diyyah*) instead of *qisās* punishment. See: Muhammad Abū Zahrah, *al-Jarimah wal-‘Uqūbah fil-Fiqh al-Islāmī*, (Cairo: Dār al-Fikr al-‘Arabī, nd), pp. 298-308, and pp. 473-480.

<sup>55</sup> Al-Rūgī, *Nazariyyat al-Taḳ‘īd*. 62. See also: *Al-Mawsū‘ah al-Fiqhiyyah*, Second Edition, (Kuwait: Wazārat al-Awqāf, 1983), 29:51.

The question which might be raised here is: why is comprehensiveness a required criterion for *qawā'id*? To answer this question, one ought to refer to the functions of *qawā'id*. As stated above (section 1.2.), the essential aim of *qawā'id al-fiqh* is to help the jurists to know and remember the legal ruling of many similar particulars and bring them together in one place in coined phrases to facilitate fixing them in the mind. This can be achieved when the ruling of any *qā'idah* is suitable and applicable to many particulars, and this is exactly what comprehensiveness means. However, comprehensiveness is relative. While the so-called *al-qawā'id al-khams al-kubrā* are as wide as to include particulars of most of the chapters of *fiqh*, many *qawā'id* cover some particulars of only one chapter, which are known as *dawābiṭ*.

The second criterion al-Rūgī suggested is *al-iṭṭirād* (continuity and freedom from break). This means two things: first, to be applicable to all of the particulars that can be included under its content without being broken by exceptions, and second, to be applicable, through its analogical nature, to the expected questions of the infinite future issues that can come under its legal ruling.<sup>56</sup> However, while the concept of *iṭṭirād* refers to both interpretations, one can notice no difference between the first interpretation and that of the concept of comprehensiveness. This is simply because for a *qā'idah* to be comprehensive means it is applicable to many particulars from different chapters of *fiqh* without being broken by exceptions, which is the same as the first interpretation he mentioned for

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<sup>56</sup> Ibid. 62-63.



*iṭṭirād*. It is perhaps for this reason, al-Rūqī rectified this matter by saying that *iṭṭirād* is connected to comprehensiveness.

The third criterion, according to al-Rūqī, is *al-tajrīd* (abstractness). Accordingly, the legal ruling of any *qā'idah* should be abstract, i.e. to refer to a general legal idea, which the particulars have in common. In other words, it should not refer to a single case or person individually, which otherwise, would be a *ḥukm juzʿī*.<sup>57</sup> For example, eliminating harm in the major *qā'idah*: "*al-dararu yuzālu*" (harm must be eliminated) does not refer to the eradication of harm pertaining to a particular case, nor does it relate to eliminating harm from an individual person in particular; instead, it means that harm must be eliminated whenever it occurs and from all suffering persons.<sup>58</sup>

It seems, however, that *al-tajrīd* is more crucial in achieving the main goal of these criteria than comprehensiveness and *iṭṭirād*, as the latter two can also be found in many of the *aḥkām juzʿiyyah*. To explain this, let us make the following comparison: phrases such as: "sale of a forced person is null", "marriage of a compelled person is not valid", "the leasing of a forced individual is void" are *aḥkām juzʿiyyah*. All are comprehensive, for they include all persons who may experience such actions, i.e. Ali, Salim, Ahmad, etc. Their legal determinations can also be described as *muṭṭaridah* (continuous and free from break), because they apply to all persons in every time. Nevertheless, such statements are not *qawā'id* in the technical sense, because they refer and apply to the situations of specific persons, and the

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<sup>57</sup> Al-Rūqī, *Nazarīyyat al-Taḳīd*, pp. 63-64. Al-Baḥusayn, *al-Qawā'id*, pp. 170-171.

<sup>58</sup> Al-Baḥusayn, *al-Qawā'id*, 171.

ruling of each is for a single case in particular. In contrast, the phrase: “*al-ikrāh yubṭil al-‘aqd*” (coercion nullifies contracts) is a *qā‘idah* because it is expressive of a general legal ruling, which many particulars have in common. Thus, all of the abovementioned phrases share a general idea, which is coercing individuals to sign some sort of contract, and they share the same legal ruling, which is the invalidity of contracts when there is coercion. This, perhaps, was the reason for some researchers including comprehensiveness under abstractness, when mentioning the criteria of *qawā‘id*.<sup>59</sup>

The fourth criterion is: *iḥkām al-ṣiyāghah* (conciseness). This relates to the wording of the *qā‘idah*. It is to use the most concise expressive words that convey the content of the *qā‘idah* in the best way possible. This requires the phrases to be comprehensive, general and accurate.<sup>60</sup> It is said, in this context, that the *qā‘idah* must also be short in the number of words used.<sup>61</sup> Yet, a reference to some traditional works, shows that some *qawā‘id* are relatively long. For example, *al-Uṣūl* of al-Karkhī, which is the first existing compiled work on this discipline, contains four out of thirty seven *qawā‘id* which are three lines long.<sup>62</sup> Furthermore, many of *al-qawā‘id* of ibn Rajab al-Ḥanbalī and of al-Maqqarī al-Mālikī are long, although some of these might not be accepted as *qawā‘id* in the technical sense.<sup>63</sup>

<sup>59</sup> Al-Baḥusayn, *al-Qawā‘id al-Fiqhiyyah*, 172.

<sup>60</sup> Al-Rūgī, *Nazarīyyat al-Taḳ‘id*, 67.

<sup>61</sup> Ibid. Al-Rūgī, to support his view, quoted the definition of Muṣṭafā al-Zarqā for *qawā‘id*, who seems to strongly emphasize this criterion. See: al-Zarqā, *al-Madkhal al-Fiqhī al-‘Amm*, 2:965-966.

<sup>62</sup> See maxims number 13, 32 and 33 in Mughal, Munir, *Islamic Legal Maxims Based on Al-Karkhī’s Al-Uṣul*.

<sup>63</sup> See: Al-Baḥusayn, *al-Qawā‘id*, pp. 183-184.

Dr. Ya<sup>c</sup>qūb al-Bāḥusayn (a contemporary Saudi *faqāh* and member of the Supreme Council of Scholars in Saudi Arabia) in his *al-Qawā'id al-Fiqhiyyah* presented more elaboration on this subject. He differentiated between the criteria of the subject and those of the ruling of the *qā'idah*. For the former, he suggested two conditions: *al-tajrīd* and *al-'umūm* (universality), which are identical to *al-tajrīd* and *al-istī'āb* which have been suggested by al-Rūqī. For the ruling of the *qā'idah*, he thought that it must be *ḥukm shar'ī*, and should be definite and categorical.<sup>64</sup> He, then, provided some conditions relating to the application of *qawā'id* to the particulars.<sup>65</sup> For example, the *qā'idah* which says: “*al-ḍarurāt tubīḥu al-maḥzūrāt*” (necessity renders prohibited things permissible), cannot be applied to the problems, unless the necessity is real, determined and does not lead to greater harm.<sup>66</sup>

However, although the intention of this elaboration on this subject by al-Bāḥusayn was to help provide more accurate and precise guidelines for those who work on extracting *qawā'id* from the traditional books of *fiqh*, some of the conditions he suggested seem to be redundant. As such, to say that the ruling of the *qā'idah* must be a *ḥukm shar'ī* does not actually give extra facts about *qawā'id*, because it is from the basic nature of *qawā'id* that their rulings are legal rulings, since the whole discipline is on and about *al-aḥkām al-shar'īyyah*. Moreover, such a condition does not seem to help much in achieving the main goal of these criteria, which is, as stated earlier, to differentiate between what is a *qā'idah* and what is a *ḥukm juz'ī*,

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<sup>64</sup> Ibid. 173-174.

<sup>65</sup> Ibid., pp. 175-178.

<sup>66</sup> Ibid. 176.

simply because both are legal rulings. As for the conditions he suggested for the application of *qawā'id*, I think they cannot be general criteria that are suitable for all *qawā'id*. Instead, they can be provided when discussing *qawā'id* individually.

#### 1.4. SOURCES OF *AL-QAWĀ'ID AL-FIQHIYYAH*.

Legal conceptions of *qawā'id* were known to the leading figures of the *madhāhib* and their disciples. They used them often in justifying their *ikhtiyārāt fiqhiyyah* (preferred legal rulings) or *ijtihād*. However, final wordings of *qawā'id* have emerged after long processes of refinement and modification in later centuries by scholars in different schools, especially those qualified as *ahl al-takhrij wa ahl al-tarjih* (scholars who reached the position of extracting the laws from the sources and giving ascendancy to one evidence over others). Yet, tracing and ascribing each single *qā'idah* to the person, who first uttered or formulated it is difficult, and in many cases impossible. The exception to this are those *qawā'id*, which are verbatim Qur'ānic verses, Prophetic traditions or authentic speech of a Companion or a leading scholar.<sup>67</sup> Perhaps this was the reason behind neglecting such an area of research by those who wrote on this discipline

Now, since each of the *qawā'id fiqhiyyah* contains a general legal ruling, they should have been taken or extracted from the sources of the *Sharī'ah*, being the primary sources, i.e. the *Qur'ān*, the *Sunnah*, *ijmā'* (the consensus) and *qiyās* (analogical deduction), or secondary sources, like

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<sup>67</sup> Al-Zarqā, *al-Madkhal*, 2:969.

*istiṣlāḥ* (considering *maṣlāḥah*, or public interest), *istiṣhāb* (presumption of continuity) and the other methods of *ijtihād*.<sup>68</sup> However, *qawā'id* can be generally classified into two major categories in this context: *naṣṣiyyah* (textual) and *ghayr naṣṣiyyah* (non-textual).<sup>69</sup> The following is a detailed presentation of each category.

#### 1.4.1. The Textual *Qawā'id*.

Many Qur'ānic verses and Prophetic traditions carry myriad meanings in a few words. Some come in the form of common juristic principles, which express legal ideas identical to those of some *qawā'id* and meet the required criteria of the formation of *qawā'id*. Jurists, while coining particular *qawā'id*, found that the words of such *nuṣūṣ* are accurate statements, which express exclusively and exactly the legal idea of these *qawā'id*; so they preferred them over their (the jurists') own words. Other *nuṣūṣ*, on the other hand, contain general legal rulings applicable to many particulars, but because they may not meet the criteria of *qawā'id* formation in one way or another; jurists deduce *qawā'id* from them, which embody their legal idea in different wordings.<sup>70</sup>

<sup>68</sup> Muhammad Shubayr, *al-Qawā'id al-Kulliyyah wal-Dawābiṭ al-Fiqhiyyah*, Second Edition, (Amman: Dār al-Nafā'is, 2007), 40. Al-Rūgī, *Naẓariyyat al-Taḳ'id*, 85. Al-Zuhaylī, *al-Qawā'id*, 1:29. Al-Būrnū, Muhammad Ṣidqī, *Mawsū'at al-Qawā'id*, 1:36.

<sup>69</sup> Al-Būrnū, *Mawsū'at al-Qawā'id*, pp. 36-43.

<sup>70</sup> Al-Rūgī, *Naẓariyyat al-Taḳ'id*, 87. Al-Bāḥusayn, *al-Qawā'id*, 192. Bin Ḥumayd, (ed), *al-Qawā'id* of al-Maqqarī, 1:119

#### 1.4.1.1. *Qawā'id* Which are Verbatim Qur'ānic Verses or Prophetic Traditions.

These refer, as stated earlier, to the texts which come in the form of common juristic principles. They are from the *Qurān* and the *Sunnah*, as follows.

##### 1.4.1.1.1. From the *Qur'ān*:

1. "*Wa 'an laysa lil-insāni illā mā sa'ā*",<sup>71</sup> (And that man can have nothing but what he does: good or bad). This comprehensive principle relates to God's Reward or Punishment of every single person in this world and in the hereafter, according to their deeds: good or bad.<sup>72</sup>

2. "*Yā ayyuhā al-ladhīna 'āmanū awfū bil-'uqūd*",<sup>73</sup> (O you who believe! Fulfill (your) obligations). This relates to fulfilling the contracts and commitments, which the whole society or individual persons are bound to, being in trade, marriage or international relations.<sup>74</sup>

3. "*Walahunna mithlu al-ladhī 'alayhinna bil-ma'rūf*",<sup>75</sup> (And they (women) have rights (over their husbands) similar (to those of their husbands) over them to what is reasonable). This regulates the relationships between spouses and, therefore, relates to chapters of family law, or what is called *al-aḥwāl al-shakhṣiyyah* (personal status).<sup>76</sup>

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<sup>71</sup> *Sūrat al-Najm*, 38. For the *Qur'ān* translation, I used al-Hilālī and Khan's translation: *Translation of the Meanings of the Noble Qur'ān in the English Language*, (Medina: King Fahd Complex for the Printing of the Holy *Qurān*, 1417 / 1997).

<sup>72</sup> Al-Rūgī, *Naẓariyyat al-Taq'id*, 89.

<sup>73</sup> *Sūrat al-Mā'idah*, 1.

<sup>74</sup> Al-Būrṇū, *Mawsū'at al-Qawā'id*, 38. Al-Rūgī, *Naẓariyyat al-Taq'id*, 90.

<sup>75</sup> *Sūrat al-Baqarah*, 228.

<sup>76</sup> Al-Rūgī, *Naẓariyyat al-Taq'id*, 91. Al-Zuhaylī, *al-Qawā'id*, 1:30.

#### 1.4.1.1.2. From the *Sunnah*

1. "*Al-kharāju bil-ḍamān*",<sup>77</sup> (revenue goes with liability). That is to say that a person who obtains the benefit of a thing, takes upon himself also the loss from it. It is used as a controller in chapters, which relate to sale and trade.<sup>78</sup>

2. "*La ḍarara wa lā ḍirār*",<sup>79</sup> (one should not cause harm, nor should he reciprocate harm with harm). This is a comprehensive principle applicable to most chapters of *fiqh*. It is the other version of one of the five universal *qawā'id*, i.e. *al-ḍararu yuzāl* (harm must be eliminated).<sup>80</sup>

3. "*Al-bayyīnātu 'alā-l-mudda'i wal-yamīnu 'alā man ankar*",<sup>81</sup> (The burden of proof is on him who alleges; the oath is on him who denies). This relates to the judiciary issues and evidences.<sup>82</sup>

#### 1.4.1.2. *Qawā'id* Derived from the *Qur'ān* or the *Sunnah* in Different Wordings.

The following are some examples of this group.

1. *Al-umūru bi-maqāṣidihā* (Matters are judged according to their objectives); one of the five grand *qawā'id*. This is extracted from the famous

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<sup>77</sup> Narrated by al-Shāfi'ī, Ahmad, Abū Dawūd and al-Tirmidhī. See: al-Suyūṭī, *al-Ashbāh wal-Nazā'ir*, 135.

<sup>78</sup> Al-Suyūṭī, *al-Ashbāh*, 135. Ibn Nujaym, *al-Ashbāh*, 175.

<sup>79</sup> Narrated by Ibn Mājah and al-Dāraquṭnī. See: al-Suyūṭī, *al-Ashbāh wal-Nazā'ir*, 85.

<sup>80</sup> Ṣāliḥ Al-Sadlān, *al-Qawā'id al-Fiqhiyyah al-Kubrā*, (Riyadh: Dār Balansiyyah, 1417 A.H.), 493. Al-Bāḥusayn, *al-Qawā'id al-Fiqhiyyah*, 195. Al-Zarqā, *al-Madkhal al-Fiqhī*, 2:990.

<sup>81</sup> Narrated by al-Bukhārī and Muslim. See: Ibn Rajab al-Ḥanbalī, *Jāmi' al-'Ulūm wal-Ḥikam*, Ed. Shu'ayb al-Arna'ūṭ and Ibrahim Bājīs, Second Edition, (Beirut: Mu'assasat al-Risālah, 1991), 2:226.

<sup>82</sup> See: al-Zarqā, *Sharḥ al-Qawā'id*, pp. 369-389.

tradition narrated by al-Bukhārī and Muslim and other scholars of *Sunnah*; that is: “indeed, actions are judged by the intentions”<sup>83</sup>.

2. *Al-yaqīnu lā yazulu bi-l-shakk* (Certainty is not lifted by doubt). This is taken from the Qurʾānic verse that says: “And most of them (the disbelievers) follow nothing but conjecture. Certainly, conjecture can be of no avail against the truth”<sup>84, 85</sup>. It is also derived from the prophetic tradition, narrated by al-Bukhārī, in which the Prophet rejected entertaining doubts in the face of valid *wuḍūʿ* (ablution). That is: “a man asked Allah's Messenger about a person who imagined to have passed wind during the prayer. Allah's Messenger replied: “He should not leave his prayers unless he hears sound or smells something”.<sup>86</sup>

3. *Al-mashaqqatu tajlibu al-taysīr* (hardship begets facility). This has been extracted from many *nuṣūṣ* from the *Qurʾān*. For example: 1. “Allah intends for you ease, and He does not want to make things difficult for you”.<sup>87</sup> 2. “Allah wishes to lighten (the burden) for you”<sup>88</sup>. 3. “and (He) has not laid upon you in religion any hardship”<sup>89, 90</sup>.

4. *Al-ḥudūdu tudraʿu bīl-shubuhāt* (*ḥudūd* punishments are to be warded off if doubts persist). This is mentioned almost verbatim in the tradition

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<sup>83</sup> Al-Rūgī, *Nazariyyat al-Taqīd*, 93.

<sup>84</sup> *Sūrat Yūnus*, 36.

<sup>85</sup> Al-Sadlān, *al-Qawāʿid*, 102. Al-Bāḥusayn, *al-Qawāʿid*, 206.

<sup>86</sup> Al-Suyūṭī, *al-Ashbāh*, pp. 50-51. Ibn Nujaym, *al-Ashbāh*, 60.

<sup>87</sup> *Sūrat al-Baqarah*, 185.

<sup>88</sup> *Sūrat al-Nisāʿ*, 28.

<sup>89</sup> *Sūrat al-Ḥajj*, 78.

<sup>90</sup> Al-Rūgī, *Nazariyyat al-Taqīd*, pp. 91-92. Al-Sadlān, *al-Qawāʿid*, pp. 220-223.



narrated by al-Tirmidhī and others, which says: "Prevent the application of *ḥadd* punishment (as much as you can) whenever any doubts persists".<sup>91</sup>

#### 1.4.2. Non-Textual *Qawā'id*.

These refer to *qawā'id*, which were deduced based on rulings whose sources were *ijmā'*, or have been extracted through the different methods of *ijtihād*, such as *qiyās*, *istiṣhāb*, *maṣlahah*, etc.<sup>92</sup> Most of *qawā'id* belong to this category, and many of them are controversial. The following are some examples of *qawā'id* belonging to this category.

##### 1.4.2.1. *Qawā'id* based on *Ijmā'*.

*Ijmā'* is defined as the unanimous agreement of the scholars (who reached the level of *ijtihād*) of the Muslim community on any matter, in any period following the demise of the Prophet Muhammad.<sup>93</sup> Although *ijmā'* on particular issues, especially on those that are open to , is difficult to prove, due to some factors mentioned in books of *uṣūl al-fiqh*,<sup>94</sup> some *qawā'id* have been formulated based on it.<sup>95</sup> The examples given for this group are the following two *qawā'id*.

1. *Lā ijtiḥād ma'a al-naṣṣ* (where there is a text (from the *Qur'ān* or the *Sunnah*) there is no room for *ijtiḥād*). The subject of this *qā'idah* is unanimously agreed upon by the different schools of law. To determine

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<sup>91</sup> Al-Suyūṭī, *al-Ashbāh*, 122. Ibn Nujaym, *al-Ashbāh*, 142.

<sup>92</sup> Al-Zarqā, *al-Madkhal al-Fiqhī*, 969.

<sup>93</sup> Kamali, *Principles of Islamic Jurisprudence*, 156.

<sup>94</sup> Ibid. pp. 155-156.

<sup>95</sup> Al-Būrṇū, *Mawsū'at al-Qawā'id*, 1:39.

legal rulings for new issues, consideration has always been given to *nuṣūṣ* from the *Qurʾān* or the *Sunnah*; hence, jurists do not practice *ijtihād* in the presence of rulings in one of them (i.e. *Qurʾān* or the *Sunnah*). In this regard, the existence of the various and different views on determining the legal status of many issues in the presence of *nuṣūṣ* was not, in most of the cases, a matter of favouring *ijtihād* over them; rather, it was mainly due to either that the *naṣṣ* is not crucial for the issue under examination (i.e. it is open to different interpretations) or, in the case of the Prophetic traditions, its authenticity is a controversial matter.<sup>96</sup>

2. *Al-ijtihād lā yunqaḍ bi mithlih* (one legal interpretation or *ijtihād* (on a single issue) is not reversed by its equivalent (on the same issue). This *qāʿidah* is said to have been attributed to a statement of the Caliph ʿUmar ibn al-Khaṭṭāb and is also supported by the consensus of the companions of the Prophet (PBUH).<sup>97</sup>

It means that when a judge makes great effort in determining the legal ruling of an issue, which has no specific basis from the *Qurʾān* or the *Sunnah*, following the required methods to achieve that, their judgment, in the end, is deemed to be the legal ruling of that particular issue.<sup>98</sup> Based on this, it is not allowed for the *mujtahid* (pl. mujtahids: a qualified jurist who practices *ijtihād*) himself to reverse what he leads him to, nor to any other *mujtahid* to reverse the judgment of the first on that particular issue. This is simply because if an *ijtihād* is to be reversed by another, then the latter must be equally subjected to reversal, which would lead to uncertainty and

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<sup>96</sup> See: ibn Taymiyyah, *Rafʿ al-Malām ʿan al-Aʿimmah al-Aʿlām*, (Riyadh: Wakalat al-Tibāʿah wal-Tarjamah, 1413 A.H), pp. 8-35.

<sup>97</sup> Zakariyah, *Application of Legal Maxims*, 53.

<sup>98</sup> Al-Suyūṭī, *al-Ashbāh*, 101. Ibn Nujaym, *al-Ashbāh*, 115.

loss of credibility in the *aḥkāṃ*. On the contrary, the *mujtahid* himself or another one can hold different judgment based on *ijtihād* on another similar issue.<sup>99</sup> It is narrated, in this regard, that ʿUmar ibn al-Khaṭṭāb, in the presence of the Companions, had made different judgments over similar issues in different times, each of which was based on a separate *ijtihād*.<sup>100</sup>

However, the idea of the *qāʿidah* is not confined to judges or *muftīs* exclusively. A normal person can also make use of it in different situations. For example, facing the *qiblah* (Mecca) is a condition for a valid prayer. Suppose that there was a person travelling in a remote place where he lost directions and time of *ẓuhr* – for instance – is due. He made efforts to determine the exact direction to *qiblah*, and based on his *ijtihād*, he performed the prayer facing, say, the southeast. His prayer is valid even if he arrived after some time to a conclusion that the direction was wrong, although he should face the new direction when performing the next prayers.<sup>101</sup>

It is remarkable here that the two examples which are given as examples of the *qawāʿid* formulated based on *ijmāʿ* are among those which are considered also as *qawāʿid ʿuṣūliyyah*, most likely because they relate to the issue of *ijtihād*, which occupies distinct chapters in most of the *uṣūl* works.<sup>102</sup>

<sup>99</sup> Al-Suyūṭī, *al-Ashbāh*, 101. Ibn Nujaym, *al-Ashbāh*, 115

<sup>100</sup> It is reported that ʿUmar bin. al-Khaṭṭāb adjudicated a case, known as *Ḥajariyyah*, in which the deceased, a woman, was survived by her husband, mother, two consanguine and two uterine brothers. ʿUmar entitled all the brothers to a share in one-third of the estate. He was told by one of the parties that the previous year, he (ʿUmar) had not entitled all the consanguine brothers to share the portion of one-third. To this the caliph replied: "That was my decision then, but today I have decided it differently". See: Al-Suyūṭī, *al-Ashbāh*, 101. Kamali, *Principles Of Islamic Jurisprudence*, 319.

<sup>101</sup> Al-Suyūṭī, *al-Ashbāh*, 101. Ibn Nujaym, *al-Ashbāh*, 115.

<sup>102</sup> Differences between *qawāʿid al-fiqh* and *qawāʿid uṣūl al-fiqh* will be among the research points of the next section of this chapter.

#### 1.4.2.2. *Qawā'id* Extracted by *Qiyās*.

*Qiyās* is the extension of a *Sharī'ah* value from an original case, or *asl*, to a new case, because the latter has the same effective cause as the former. The original case is regulated by a given text, and *qiyās* seeks to extend the same textual ruling to the new case.<sup>103</sup>

Formulating *qawā'id al-fiqh*, in general, is an analogical process in the first place, because it seeks to link the issues and questions that share common *'illah* (cause) of the ruling.<sup>104</sup> Furthermore, the term of *al-ashbāh wal-naẓā'ir*, which comprises *al-qawā'id al-fiqhiyyah*, indicates their analogical nature.<sup>105</sup> For this reason, *qiyās* has been the richest source used by *fuqahā'* in this context.<sup>106</sup> The following are examples of *qawā'id*, which have been extracted through *qiyās*, with comments on the first two.

1. “*Mā ḥaruma isti'māluhu ḥaruma ittikhādhuhu*” (when it is forbidden to make use of a thing, it is also forbidden to possess it). Several *nuṣūṣ* forbid the consumption of particular things, such as wine and pork and the usage of other things, such as eating in plates made from gold or silver. Jurists, via *qiyās*, concluded that the acquisition of these things and the like is also forbidden. The *'illah* is that in each of the consumption or usage and acquisition there is utilization of a harmful thing. The new legal ruling, which is acquired via *qiyās*, is true with regard to the cases individually. Thus, it can be a common legal ruling which would be applicable to all of these cases. The mentioned *qā'idah* was formulated to express this common legal ruling. To apply this *qā'idah*, let us examine the following example.

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<sup>103</sup> Kamali, *Principles*, 180.

<sup>104</sup> Al-Rūgī, *Nazariyyat al-Taḳīd*, 113.

<sup>105</sup> Al-Rūgī, *al-Qawā'id al-Fiqhiyyah Min Khilāl Kitāb al-Ishrāf*, 121.

<sup>106</sup> Al-Rūgī, *Nazariyyat al-Taḳīd*, 113.

The legal ruling on the consumption of wine is that it is forbidden, which has been known via *nuṣūṣ*. The *‘illah* of forbidding wine is that it causes intoxication, which is also found in beers, which makes the consumption of beer also forbidden. The acquisition of wine is forbidden, which was concluded through *qiyās*; thus the acquisition of beers should also be forbidden analogically.

2. *Al-ghālibu ka-l-muḥaqqaq* (what is of predominant occurrence is equal legally to what occurs invariably). In many cases, what is of predominant occurrence has been given, through *qiyās*, the same legal ruling of what occurs permanently, because both share the same *‘illah*, which is the assured possibility of occurrence. For example, if a husband said to his wife: “you are divorced if you menstruate”, divorce occurs immediately, and is not to be delayed until she really starts the next period, because menstruation is of predominant occurrence for women. It is given the same ruling as to connect divorce to one of women’s essential characteristics, such as being female.<sup>107</sup> Because of the existence of several cases which are similar to this case, whose legal rulings have been reached through *qiyās*, jurists formulated this *qā‘idah* to encompass these cases and the like.

3. *Al-dawāmu ka-l-ibtidā’* (continuation of doing something is legally equal to starting it).

4. *Mā ḥaruma akhdhuhu ḥaruma iṭṭā’uhu* (when it is forbidden to take a thing it is also forbidden to give it).

5. *Al-mumtani‘u ‘ādatan ka-l-mumtani‘i ḥaqīqatan* (a thing that is customary to regard as impossible is considered to be impossible in fact).

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<sup>107</sup> Al-Ghiryānī, *Taḥqīqāt*, 40. Al-Rūgī, *Nazarīyyat al-Taḥqīd*, 122.

5. *Al-thābitu bil-burhān ka-l-thābiti bil-ʿayān* (a thing established by proof is equivalent to a thing established by visual inspection).<sup>108</sup>

#### 1.4.2.3. *Qawāʿid* Extracted Through *Istishāb*

*Istishāb* means the continuation of the situation of a matter, whose existence or non-existence had been proven in the past, and which are presumed to remain so for lack of evidence to establish any change.<sup>109</sup> For example, once a contract of marriage is concluded, it is presumed to remain in force until there is a change. Therefore, the marital status of the spouses is presumed to continue until dissolution of marriage can be established by evidence, and a mere possibility that the marriage might have been dissolved is not enough to rebut the presumption of *istishāb*.<sup>110</sup>

Although the validation of *istishāb* as a source of law is not agreed upon, it has been used in determining the rulings of many particulars and issues. Consequently, it was one of the sources through which many *qawāʿid fiqhiyyah* have been established.<sup>111</sup> To formulate *qawāʿid* using *istishāb* means to create legal principles, which gather under their remit cases whose legal rulings have been conducted through *istishāb* in a way that expresses their common legal idea.<sup>112</sup>

Let us now give this example. If A claimed that he lent B a sum of money, presenting no evidence to support their claim, but B denied. The situation of the latter will be upheld because the normal state is the absence of any loan, which can only be rebutted by presenting evidence. The

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<sup>108</sup> Al-Rūgī, *Nazariyyat al-Taḳīd*, pp. 115-127.

<sup>109</sup> Kamali, *Principles*, 259.

<sup>110</sup> Ibid.

<sup>111</sup> Al-Rūgī, *Nazariyyat al-Taḳīd*, pp. 134-135.

<sup>112</sup> Ibid., 495.

reverse of this example is also true. If it is known that A has lent B a sum of money, yet the latter, without presenting any piece of evidence, claims that he brought back the money to the former who denied. Accordingly, B is still indebted to A, because this is the real situation in the absence of evidence, which proves otherwise. Jurists have coined a number of *qawā'id* to include these cases and others similar to them. Among these *qawā'id* are the following:<sup>113</sup>

1. *Al-aşlu barā'atu al-dhimmah* (freedom from liability is a fundamental principle).
2. *Al-aşlu baqā'u mā-kāna 'alā mā-kān* (it is a fundamental principle that a thing shall remain as it was originally).
3. *Al-aşlu fīl-umūri al-'āridati al-'adam*, (Non-existence is a fundamental presumption attached to intervening (transitory) attributes).

#### 1.4.2.4. *Qawā'id* Formed Based on *Istislāh* (Considerations of *Maşlahah*, or Public Interest).

*Istislāh* means to legislate a legal ruling according to *maşlahah mursalah*, which in turn means the unrestricted public interest which has not been regulated by the Law, as no text can be found for its validity or otherwise.<sup>114</sup> The collection of various writings of the *Qur'ān* in one compilation during the time of Abū Bakr al-Şiddīq (the first Caliph), establishing prisons, and imposing tax (*kharāj*) on agricultural lands in the conquered territories are examples of actions done considering *maşlahah*, since no special textual authority could be found in favour of any of

<sup>113</sup> Al-Zarqā, *al-Madkhal*, 2:984. Al-Bāḥusayn, *al-Qawā'id*, 236. Al-Rūgī, *Naẓariyyat al-Taḳīd*, pp. 136-140.

<sup>114</sup> Kamali, *Principles*, 235.

them.<sup>115</sup> While the meaning of *maṣlahah* is 'public interest', the meaning of *istiṣlāḥ* is to seek the best public interest.

Using *istiṣlāḥ* in forming *qawā'id* means to formulate general legal principles through the consideration of *maṣlahah*.<sup>116</sup> This requires the *faqīh* to have considered knowledge of *maqāṣid* (the intentions) of the *Sharī'ah*.<sup>117</sup>

Let us examine the following examples.

1. Marriage, according to the Islamic law, is *mandūbun ilayh* (recommended) in general, but if it leads the husband to do prohibited things, such as stealing, in order to provide his wife with required expenses and *nafaqah* (maintenance), marriage is then *ḥarām* (prohibited).<sup>118</sup>
2. Selling grapes or other types of fruit is *mubāḥ* (permissible), but if it comes to the knowledge of the seller that the buyer is to make wine from the grapes, the sale then becomes *ḥarām*.
3. Letting properties is *mubāḥ*, yet if the purpose of the renter is to turn the property into a brothel, then it becomes *ḥarām* for the owner to let it.

Considering the consequences of these originally permitted activities, *fuqahā'* formed a *qā'idah* that says: *mā-yufḍī ilā-l-ḥarāmi ḥarām* (what leads to unlawful actions is also unlawful). The cases of marriage, selling grapes and letting properties mentioned above are all forbidden, because they all lead to a prohibited result, and thus acquire the value of the latter.

The following *qawā'id* were also formulated based on *maṣlahah*:<sup>119</sup>

1. *Mā-lā yatimmu al-wājibu illā bihi fahuwa wājib* (the means to an obligatory is obligatory).

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<sup>115</sup> Ibid.

<sup>116</sup> Al-Rūgī, *Nazarīyyat al-Taḳīd*, 143.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid., 146.

<sup>119</sup> Ibid., pp. 145-150.



2. *Mā-yufdī ilā-l-makrūhi makrūhun* (what leads to an abominable action is abominable itself).

These *qawā'id* are closely related to the *qā'idah uṣūliyyah* of *sadd al-dharī'ah* (blocking the means). Although *sadd al-dharī'ah* might suggest otherwise, in its juridical application, it also extends to opening the means to good deeds, because what regulates the means and the end is *maṣlaḥah*.

## 1.5. RELATIONSHIPS BETWEEN *AL-QAWĀ'ID AL-FIQHIYYAH* AND OTHER DISCIPLINES OF *FIQH* THOUGHT.

The science of *al-qawā'id al-fiqhiyyah* is one of the disciplines that comprise *fiqh*. Although each discusses certain aspects and is different and unique in specific areas, they are intimately connected. This section is devoted to discussing the relationships between *qawā'id al-fiqh* and *al-qawā'id al-uṣūliyyah*, *al-ashbāh wal-naẓā'ir*, *al-furūq* and *al-naẓariyyāt al-fiqhiyyah*.<sup>120</sup>

### 1.5.1. *Al-Qawā'id Al-Uṣūliyyah*

The sciences of *fiqh* and *uṣūl al-fiqh* are obviously connected to each other,<sup>121</sup> as is lexically signified by the term, *uṣūl al-fiqh* (the sources or the origins of *fiqh*) representing the root, whereas *fiqh* is the branch.<sup>122</sup> The relationship between the two disciplines is conceived similar to the

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<sup>120</sup> The meanings of these terms will be mentioned when discussing each in the following pages.

<sup>121</sup> Al-Nadawī, *al-Qawā'id*, 67.

<sup>122</sup> Al-Būrñū, *Mawsū'at*, 1:25.

relationship of the rules of grammar to a language, or of logic to philosophy.<sup>123</sup>

Nevertheless, each of the disciplines has its own scope, framework, rules, schools and methods.<sup>124</sup> Basically, *uṣūl al-fiqh* is the science that is concerned with the methodology, which is to be followed for deducing the legal rulings from the sources of the law, i.e. the Qurʾān, the *Sunnah*, *ijmāʿ*, *qiyās*, etc.<sup>125</sup> Legal reasoning, the rules of interpretation, the meaning and implication of commands and prohibitions are examples of the areas covered by *uṣūl al-fiqh*. It also regulates *ijtihād* by providing the jurist with the guidelines and criteria that he should follow while making his efforts to find out the correct legal rulings for the new problems based on the sources of *Shariʿah*.<sup>126</sup> *Fiqh*, on the other hand is the science, which is concerned with the knowledge of the detailed rules of Islamic law in its various branches.<sup>127</sup> It has been defined as 'the knowledge of the practical rules of *Shariʿah* acquired from the detailed evidence in the sources'.<sup>128</sup> *Fiqh* is also considered to be the law itself.<sup>129</sup>

Accordingly, the natures of the *qawāʿid* of each of the two disciplines are based on the nature of the disciplines themselves, and hence, the relationship between both categories of *qawāʿid* is governed by the relationship between the disciplines.<sup>130</sup> However, both categories of *qawāʿid* have similarities and differences, although some similarities may also be

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<sup>123</sup> Kamali, *Principles*, 12. Al-Nadawī, *al-Qawāʿid*, 68.

<sup>124</sup> Al-Būrñū, *Mawsūʿat al-Qawāʿid al-Fiqhiyyah*, 1:25.

<sup>125</sup> Al-Nadawī, *al-Qawāʿid*, 69.

<sup>126</sup> Kamali, *Principles*, 13.

<sup>127</sup> Ibid. 12.

<sup>128</sup> Al-Bāḥusayn, *al-Qawāʿid*, 38. Kamali, *Principles*, 12.

<sup>129</sup> Kamali, *Principles*, 12.

<sup>130</sup> Al-Būrñū, *Mawsūʿat al-Qawāʿid*, 1:25

common and shared by *qawā'id* of other disciplines. As such, both serve the law and the target of each is the legal rulings on the different issues.<sup>131</sup> In addition, every *qā'idah* in each group encompasses many *juz'iyyat* (particulars) that share its general idea and subject.<sup>132</sup> On the other hand, they differ in their nature, the functions they perform, the scope of their application over particulars and some other points. It deserves mention here that ibn Nujaym al-Ḥanafī in his *al-Ashbāh wa al-Naẓā'ir* stated that *qawā'id al-fiqh* are the real *uṣūl al-fiqh*.<sup>133</sup> Whilst his statement was not accepted and endorsed by other scholars, the commentator Shihab al-Dīn al-Ḥamawī (d. 1098 / 1229) glosses this by saying that what he really meant is that they are similar in many ways.<sup>134</sup>

Shihāb al-Dīn al-Qarāfī (d. 684 / 1285) at the introduction of his *al-Furūq* was the first who differentiated between *al-qawā'id al-fiqhiyyah* and *al-qawā'id al-uṣūliyyah*.<sup>135</sup> He put them on an equal footing<sup>136</sup>, saying:

"... The great Sharīḥ of Muhammad, may Allah increase the honour of its beacon, comprises *uṣūl* (fundamentals) and *furū'* (particulars). Its *uṣūl* are of two types: the first is known as *uṣūl al-fiqh*, which is mainly nothing but the rules of the law which were deduced particularly through the Arabic words and what may happen to these words; like abrogation and preference and alike, and the rules such as: order indicates obligation, decisive command of refraining indicates prohibition, the special words used to express generality and alike. Few other rules are rather than these, such as the *qiyās* is a considered evidence, the *khabar al-wāḥid* (solitary reports) and the attributes of the *mujtahidūn*. The second are the magnificent

<sup>131</sup> Shubayr, *al-Qawā'id al-Kulliyyah*, 27.

<sup>132</sup> Al-Sadlān, *al-Qawā'id al-Kubrā*, 20. Al-Nadawī, *al-Qawā'id*, 69.

<sup>133</sup> Ibn Nujaym, *al-Ashbāh*, 10.

<sup>134</sup> Al-Ḥamawī, *Ghamz 'Uyūn al-Baṣā'ir*, 1:34.

<sup>135</sup> Al-Būrī, *Mawsū'at al-Qawā'id*, 1:25. Al-Nadawī, *al-Qawā'id*, 67.

<sup>136</sup> Wolfhart, *Qawā'id as a Genre of Legal Literature*, 372.

comprehensive *fiqhī* rules, which are big in number and have tremendous supplies, and embody the secrets and wisdoms of the *Sharīʿah*. Each has countless particulars, yet none has been mentioned within the scope of *uṣūl al-fiqh*, although there is a general hint of them in it..."<sup>137</sup>

Now, the *qawāʿid uṣūliyyah* are mainly language-orientated rules, which are used to understand the *dalālat* (implications) of a given text, as words are of various types with regard to their clarity, scope and capacity to convey the meaning.<sup>138</sup> As such, they aim to distinguish the *muṭlaq* (absolute) text in the *Qurʾān* or the *Sunnah* from the *muqayyad* (qualified), the *ẓāhir* (manifest) from the *naṣṣ* (explicit), the *ʿāmm* (general) from the *khāṣṣ* (specific), the *ḥaqīqī* (literal) from the *majāzī* (metaphorical) etc.<sup>139</sup> So, unless the language of the non-self-evident texts from the *Qurʾān* or from the *Sunnah*, be they commands, prohibitions, etc., is clearly understood, no correct ruling can be deduced from its implication. However, there are many *qawāʿid uṣūliyyah*, which are not determined solely on the ground of language, such as those which regulate *qiyās* and other methods of *ijtihād*, and others that deal with the conflict between *adillah* (evidences).<sup>140</sup>

The following are examples of *al-qawāʿid al-uṣūliyyah* with some illustrations.

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<sup>137</sup> Al-Qarāfī, *al-Furūq*, 1:70.

<sup>138</sup> Al-Bāḥusayn, *al-Qawāʿid*, 135-136. Kamali, *Principles*, 13. <sup>139</sup> Shubayr, *al-Qawāʿid al-Kulliyah*, 28.

<sup>139</sup> Kamali, *Principles*, 13.

<sup>140</sup> See: Al-Qarāfī, *al-Furūq*, 1:70. Al-Bāḥusayn, *al-Qawāʿid*, 136.

1. *al-amru li-l-wujūb* (a command is indicative of an obligation)".<sup>141</sup> The *Qurʾān* says: "and perform prayers"<sup>142</sup>. This indicates that performing prayer is compulsory.<sup>143</sup> Likewise, the obligation of the Muslims' prayer to be the exact replica of the Prophet's is taken from the *ḥadīth* in al-Bukhārī and others saying: 'offer your prayers in the way you saw me offering my prayers'.<sup>144</sup>

2. *al-amru baʿda al-ḥaṣri yadullu ʿalā al-ibāḥah* (a command which comes after a prohibition in the same context indicates mere permissibility).<sup>145</sup> For example, in *Sūrat al-Jumuʿah*, for example, the *Qurʾān* says:

“O you who believe! When the call is proclaimed for the Friday Prayer, come to the remembrance of Allah and leave off business ... Then when the prayer is ended, disperse through the land and seek the bounty of Allah...”<sup>146</sup>

The commands: “disperse through the land and seek the bounty of Allah” comes after prohibition of the involvement in any business during Friday prayer. This indicates that dispersing through the land after performing the prayer is only *mubāḥ* and not *wājib*. Therefore, one can, instead, go to his house, can relax, play, read or do any other activities.

3. *al-nahyu yadullu ʿalā al-taḥrīm* (If the instruction is connected with a decisive command of refraining from an action then the action is

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<sup>141</sup> Wahbah Al-Zuhaylī, *Uṣūl al-Fiqh al-Islāmī*, (Damascus: Dār al-Fikr, 1986), 1:45. Al-Rūḡi, Muhammad, *Nazarīyyat al-Taḳīd*, 59.

<sup>142</sup> *Sūrat al-Baqarah*, 42.

<sup>143</sup> Al-Zuhaylī, *Uṣūl al-Fiqh*, 1:46.

<sup>144</sup> Muhammad ibn Ismāʿīl Al-Bukhārī, *al-Jāmiʿ al-Ṣaḥīḥ*, Third Edition, (Beirut: Dār ibn Kathīr, 1987), 1:226

<sup>145</sup> Al-Zuhaylī, *Uṣūl al-Fiqh*, 1: 88.

<sup>146</sup> *Sūrat al-Jumuʿah*, 9-10.

prohibited.<sup>147</sup> Therefore, the verse which says: “And come not near to adultery”<sup>148</sup> indicates that adultery is forbidden.

4. *al-muṭlaq yabqā ʿalā iṭlāqihi illā idhā jāʿa mā yuqayyiduhu* (The absolute text remains as such in its application unless there is a limitation to qualify it”.<sup>149</sup> The Qurʾān says:

“And those who make unlawful to them their wives by *ṣihār*<sup>150</sup> and wish to free themselves from what they uttered (the penalty) in that case is the freeing of a slave before they touch each other”.<sup>151</sup>

The word (slave) in this verse is *muṭlaq*, so freeing any slave will be suitable to fulfill the requirement, be he a believer, a disbeliever, a man, a woman, a child, etc.<sup>152</sup>

5. *yuqaddamu al-muqayyadu ʿalā al-muṭlaq* (when an absolute text is qualified into a *muqayyad*, the latter is to be given priority over the former”.<sup>153</sup> Take, for example, the two Qurʾānic verses on the prohibition of blood for human consumption. The first says: “forbidden to you are the dead carcass and blood”.<sup>154</sup> The other says:

“Say (O Muhammad): I find not in that which has been revealed to me anything forbidden to be eaten by one who wishes to eat it, unless it be a dead animal or blood poured forth (by slaughtering or the alike) or the flesh of swine ...”.<sup>155</sup>

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<sup>147</sup> ʿAbdulkarīm Zaydān, *al-Wajīz fī Uṣūl al-Fiqh*, (Baghdad: Muʾassasat Qurṭubah, nd), 41.

<sup>148</sup> Sūrat al-Isrāʾ, 32.

<sup>149</sup> Kamali, *Principles*, 111.

<sup>150</sup> *Ṣihār*, which is derived from *ṣahr*, means, the back. During the time of *Jāhiliyyah*, one of the ways to declare divorce by the pagan Arabs is that one would say to his wife, "To me, you are like the back of my mother." In Islam, this is not considered divorce, for Muslims are allowed to pay expiation for this statement.

<sup>151</sup> Sūrat al-Mujādilah, 3

<sup>152</sup> Zaydān, *al-Wajīz*, 285.

<sup>153</sup> Al-Zuhaylī, *Uṣūl al-Fiqh*, 1:213.

<sup>154</sup> Sūrat al-Māʾidah, 3.

<sup>155</sup> *Sūrat al-Anʿām*, 145.

The word 'blood' in the first verse is *muṭḥlaq*, whereas it came qualified as poured forth in the second. In this case the *muqayyad* is to be considered, and subsequently blood, which remains with the flesh or inside the veins is permissible to be eaten.<sup>156</sup>

6. *al-ʿillah fī-l-qiyās yajibu ʿan takuna waṣfan munāsiban* (when making *qiyās*, the *ʿillah* (cause) must be a proper attribute) - in that it bears a proper and reasonable relationship to the *ḥukm* (law of the text)".<sup>157</sup> As such, wine is prohibited not because of its colour or taste, or being put in special bottles, but because it is an intoxicant. Thus, any type of drink, unless it is an intoxicant, is not forbidden to be consumed.

7. *al-Qurʾānu wa-l-Sunnatu al-mutawātirah lā yunsakhāni bi-l-adīthi al-daʿifi wa lā bi-l-ijmāʿi wa lā bi-l-qiyās* (a Qurʾānic text or a *mutawātir ḥadīth* (successive Prophetic tradition) cannot be abrogated by a weaker Prophetic tradition, by *ijmāʿ* or by *qiyās*".<sup>158</sup>

Hence, unlike *al-qawāʿid al-fiqhiyyah*, *al-qawāʿid al-uṣūliyyah* do not include legal rulings within their contents. They are, as shown above, methods for interpretation of the sources of the law, regulations that govern the practice of *ijtihād*, and the relevant chapters and guidelines that help jurists to understand the texts and apply their indications properly. *Al-qawāʿid al-fiqhiyyah*, on the other hand, contain comprehensive legal rulings, i.e. they are applicable to many *juzʾiyyāt*. Their main function, as stated in another section (see section 1.2 above), is to help the jurist have a general and holistic understanding of the different chapters of *fiqh*.

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<sup>156</sup> Kamali, *Principles*, 111.

<sup>157</sup> Ibid., 191.

<sup>158</sup> Ibid., 140.

The existence of *al-qawā'id al-uṣūliyyah* is hypothetically prior to the existence of *fiqh* itself. Since they deal with the sources of *fiqh*, they were on the minds of the jurists from the very beginning and used by them as such, although the first actual compilation of *al-qawā'id al-uṣūliyyah* in written form was *al-Risālah* of Al-Shāfi'ī (who died in 204 / 819). *Al-qawā'id al-fiqhiyyah*, in contrast, came later because their main function is to facilitate remembering several *juz'īyyāt fiqhiyyah* for jurists. Therefore, the chronological order is as follows: *qawā'id al-uṣūl* came first, *fiqh* is second and *qawā'id al-fiqh* are at the last stage.<sup>159</sup>

With respect to the scope of application to their particulars, *al-qawā'id al-uṣūliyyah* are more comprehensive than *qawā'id al-fiqh*, so only a few exceptions were recorded.<sup>160</sup> Perhaps the reason behind that is because they are mainly language-orientated rules, which were formulated based on the language usage of the Arabs in the pre-Islamic period. What is worth mentioning in this context is that making use of *al-qawā'id al-uṣūliyyah* is not limited to Islamic law. They can be useful to modern statutory law as a guideline for the jurist or the judge when failing to find any guidance in the text of the statute on a particular issue. He is likely to make an analogy or use the interpretation rules to come to a judicial construction to find out the ruling for that issue.<sup>161</sup>

Finally, there are a number of *qawā'id*, which are counted among the *qawā'id fiqhiyyah* and *qawā'id uṣūliyyah* at the same time. This is apparently based on the angle the jurists look at them through, and use

<sup>159</sup> Al-Nadwī, *al-Qawā'id*, 69. See also: Introduction of the editor of *Īdāh al-Masālik* of al-Wansharīsī, 30.

<sup>160</sup> Al-Būrnū, *Mawsū'at al-Qawā'id*, 1:27.

<sup>161</sup> Kamali, *Principles*, 13.



them accordingly. The *uṣūl* scholars use them as controllers that regulate the deduction of the legal rulings from the sources of the law, or as a regulation for using *ijtihād*, whereas *fuqahāʿ*, in contrast, using them as comprehensive principles applicable to many particulars.<sup>162</sup> Take as an example, the *qāʿidah* which says: *al-ʿurfu muʿtabarun mā lam yuṣādim naṣṣan sharʿiyyan* (custom is considered unless it conflicts with a legal text). For *uṣūlī* scholars, this *qāʿidah* regulates the usage of custom as a base of judgment. So the theory is that in case of using *ʿurf* as such, it should be in harmony with the *sharīʿah*. In other words, it should not contradict a text from the Qurʾān or the *Sunnah*. For *fuqahāʿ*, on the other hand, if it happens that a *ʿurf* contradicts a *naṣṣ*, the *ʿurf* is not considered. Hence, if a *ʿurf* of any society is, for example, that the debtor, when giving the creditor his money back, gives more than what he took, the *ʿurf* here is null, and subsequently this kind of transaction is prohibited, because it contradicts many texts from the *Qurʾān* and the *Sunnah*, which stipulates that *ribā* (usury) is forbidden. Likewise, if a *ʿurf* is to marry women without giving them dowry, the *ʿurf* is nothing, and the marriage contract is not valid accordingly, since it contradicts the Qurʾānic verse stating that women should be given their dowry at the time of marriage. In conclusion, when the subject matter of a *qāʿidah* of this type is a legal evidence then it is a *qāʿidah uṣūliyyah*; and when it is an individual's action then it is considered a *qāʿidah fiqhiyyah*.<sup>163</sup> It can also be said in this context that *uṣūlī* scholars provide theory, and *fuqahāʿ* deal with application.

<sup>162</sup> Al-Būrnū, *Mawsūʿat al-Qawāʿid*, 1:27.

<sup>163</sup> Al-Amiri, *Legal Maxims*, 60.

### 1.5.2. *Al-Ashbāh Wal-Naẓāʿir*.

*Al-Ashbāh wal-Naẓāʿir* is a genre of legal literature devoted to the *furūʿ*<sup>c</sup> (particulars).<sup>164</sup> There is no agreement among the scholars in determining the exact meaning of this phrase. While some use it to mean exactly what *qawāʿid* mean, it is more comprehensive, according to others, and include *qawāʿid*, *furūq* (distinctions), *ḥiyal*<sup>165</sup> (tricks), and other related legal subjects. Furthermore, according to some scholars the terms *ashbāh* and *naẓāʿir* are identical, but for others each denotes a different meaning.

The term, however, originated in the famous letter of the Caliph ʿUmar ibn al-Khaṭṭāb to the judge of al-Baṣrah, Abū Mūsā al-Ashʿarī. ʿUmar in this letter instructed the judge, when making legal judgment for cases that have no clear legal determinations in the *Qurʾān* or the *Sunnah*, to ascertain their *amthāl* and *ashbāh* (similitudes and resemblances) that have legal determination and make *qiyās* (analogy) in order to reach to what he believes is the best judgment.<sup>166</sup>

According to al-Isnawī in his *al-Jawāmiʿ wal-Fawāriq*, the function of *al-ashbāh wal-naẓāʿir* is to bring the particulars that share a common legal ruling under one principle.<sup>167</sup> This is obviously identical to one of the functions of *qawāʿid al-fiqh*. Consequently, the terms are two names of one

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<sup>164</sup> Shubayr, *al-Qawāʿid al-Kulliyah*, 32.

<sup>165</sup> *Ḥiyal* (sig. *ḥilah*) is used in Islamic jurisprudence in two meanings. Firstly as tricky solutions to difficult problems without frustrating the purpose of law. Secondly, as device and subterfuge to circumvent certain Shariah prohibition or to evade certain obligation. The first is permissible, whereas the second is not. See: *al-Mawsūʿah al-Fiqhiyyah*, pp. 18: 330-331. See also: Muhammad Tahir Mansoori, *Use of Hiyal in Islamic Finance and its Shariʿah Position*, at: (<http://www.icibriu.org/2011/downloads/DR%20Mansoori%20Use%20of%20Hiyal%20in%20Islamic%20Finance.pdf>).

<sup>166</sup> Al-Suyūṭī, *al-Ashbāh*, 6. Al-Nadawī, *al-Qawāʿid*, pp. 74-75. Shubayr, *al-Qawāʿid al-Kulliyah*, pp. 32-33.

<sup>167</sup> Jamāl al-Dīn ʿAṭṭyah, *al-Tanzīr al-Fiqhī*, (Cairo: Maṭbaʿat al-Madinah, 1987), 52.

discipline. On the other hand, according to Jamāl al-Dīn °Aṭiyyah in his *al-Tanzīr al-Fiqhī*, al-Suyūṭī and ibn Nujaym in their books - both bearing the title of *al-Ashbāh wal-Naẓāʾir* - use the term to refer to the legal rulings of the various situations of one single subject, which are scattered in the different chapters of *fiqh*. For example: the rulings of the different situations of the blind, the disbeliever, the coerced person, the slave, etc.<sup>168</sup> But, the two books and others that bear the same title use the term for more comprehensive goal than what °Aṭiyyah suggests. Their main purpose is to mention the issues and cases that are either alike in both *ṣūrah* (appearance) and in *ḥukm* (legal status), or alike only in the *ṣūrah* but different in the *ḥukm*. They also include the cases that are exempted from more comprehensive principles, the features of *jam*<sup>c</sup> (combining) and *farq* (separating) of the cases, and other topics that relate to the mentioned main purpose, such as *alghāz* (riddles) and *hiyal*, which aim to refresh the memory and motivate further study. Hence, since *al-qawāʿid al-fiqhiyyah* are comprehensive principles each of which includes many particulars, they are, accordingly, a part of *al-ashbāh wal-naẓāʾir*. This justifies why they occupy more than one third of each of *al-Ashbāh wal-Naẓāʾir* of al-Suyūṭī and ibn Nujaym and about a half of al-Subkī's work, entitled also as *al-Ashbāh wal-Naẓāʾir*.

On the other hand, the two terms of *ashbāh* and *naẓāʾir* denote the same meaning for many scholars. Their reference is the lexical meanings of the two terms, where *shabīh* and *naẓīr* (the singular forms of *ashbāh* and *naẓāʾir*) mean the same thing. Consequently, they technically, according to

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<sup>168</sup> Ibid.

this group, refer to the issues that resemble each other and have the same legal status.<sup>169</sup> For many other scholars, in contrast, the terms *ashbāh* and *naẓāʾir* denote different meanings. To them, *ashbāh* refers to the cases or issues that are alike in appearance and legal status, whereas cases which are qualified as *naẓāʾir* are alike only in the appearance.<sup>170</sup> Accordingly, *ashbāh* are then the particulars of *fiqh* that share common legal ruling and can subsequently be grouped under more comprehensive principles. This, however, may raise a question because *naẓāʾir* are then identical to *furūq*, which is another genre of the legal literature. For this reason, some modern consider that *al-ashbāh wal-naẓāʾir* is a general term used by many traditional scholars to combine *qawāʿid* and *furūq*.<sup>171</sup> Many of them, in this context, were quoted saying that *al-fiqh jamʿun wa-farq*,<sup>172</sup> (*fiqh* is actually the knowledge of combining and separating), i.e. the knowledge of the issues that are alike in appearance and legal ruling, and of those alike in appearance, but different in the legal ruling.

Al-Ḥamawī, the commentator of *al-Ashbāh wal-Naẓāʾir* on ibn Nujaym, made the matter more complicated when he defined the term of *al-ashbāh wal-naẓāʾir* as: “the issues that resemble each other, but are actually different with regard to their legal rulings, due to hidden factors which have been revealed by *fuqahāʾ*.”<sup>173</sup> He mentioned as examples some works on *al-ashbāh wal-naẓāʾir*, all of which bear the title of *furūq*, such as

<sup>169</sup> Al-Nadwī, *al-Qawāʿid*, 73. Jibrīl Megā, *Dirāsah Taḥlīliyyah Muʿṣṣalah Litakhrīj al-Furūʿ ʿAlāl-uṣūl*, (a PhD thesis at Umm al-Qūrā University, 1999), 273

<sup>170</sup> Shubayr, *al-Qawāʿid al-Kullīyyah*, 33. Al-Nadawī, *al-Qawāʿid*, 77.

<sup>171</sup> Al-Nadawī, *al-Qawāʿid*, 77.

<sup>172</sup> Muhammad ibn Bahādir Al-Zarkashī, *al-Manthūr Fil-Qawāʿid*, ed. Taysīr Fāʾiq Mahmūd, (Kuwait: Wazārat al-Awqāf wa al-Shuʿūn al-Islāmiyyah, 1985), 1:69.

<sup>173</sup> Al-Ḥamawī, *Ghamz Uyūn al-Baṣāʾir*, 1:38.

*Furūq al-Maḥbūbī and Furūq al-Karābīsī*.<sup>174</sup> This leads to a kind of confusion, because it makes the whole discipline identical to that of the discipline of *al-furūq*. However, when referring to the original work, ibn Nujaym in the introduction made a list of the topics he intended to discuss in his book. He called the sixth topic as *al-ashbāh wal-naẓāʿir*, but when he came to discuss it, he called it *furūq*!<sup>175</sup> It seems that it is either a mistake or a kind of terminological laxity. Perhaps then, the definition of the commentator, al-Ḥamawī, was for *furūq* rather than for *al-ashbāh wal-naẓāʿir*. If this was true, he should have provided a note to avoid creating such confusion.

### 1.5.3. *Al-Furūq*.

*ʿIlm al-Furūq* is one the legal disciplines that contributes to the construction of a coherent and contradiction-free system of *furū*<sup>c</sup> (particulars) of *fiqh*.<sup>176</sup> It is the means by which jurists have distinguished between the cases in the law whose appearances resemble each other, but their legal statuses are different. This results in giving the correct legal ruling to the cases under research. *Furūq* are considered also as one of *qawādiḥ al-ʿillah* in *qiyās*, that is the factors that affect the effective cause of the *aṣl* (the original case) to be applied to the *far*<sup>c</sup> (the new case), and

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<sup>174</sup> Ibid.

<sup>175</sup> See: Ibn Nujaym, *al-Ashbāh*, 8 and 489 respectively.

<sup>176</sup> Wolfhart Heinrichs, 'Structuring the Law: Remarks on the Furūq Literature', in: *Studies in Honour of Clifford Edmund Bosworth*, ed. Ian Richard Netton, Volume I. (Leiden: Brill, 2000), 333.

consequently ban the process of *qiyās* from being practiced on these cases.<sup>177</sup>

There was no single traditional work which discusses theoretical aspects of this science or gives a general picture for it, such as its scope, methodology, elements, emergence, development, etc. What is available in this regard focuses on stating detected *furūq* between the cases, the reasons which lead to this status, and consequently, giving an appropriate legal ruling to each case.<sup>178</sup> This situation is also true with respect to the modern legal works. Perhaps the only exception is the book written by Dr. Ya<sup>c</sup>qūb al-Bāḥusayn, entitled *al-Furūq al-Fiqhiyyah wal-Uṣūliyyah* (1998), which is a historical, theoretical and descriptive study on *furūq*, where the author discusses its elements, conditions, development and other related subjects. However, there are other brief discussions on this discipline in the introductions of some traditional texts, which have been recently edited and published for the first time.

Be that as it may, *furūq*, as the word indicates, are the crucial elements of the cases (which share certain common respects) that lead these cases to be treated distinctly and given different legal rulings.<sup>179</sup> The following are some examples to illustrate the matter.

1. Prayer and fasting are forbidden during the menstruation period, but women have to make up for the fast but not for prayer. The common respect

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<sup>177</sup> Ya<sup>c</sup>qūb al-Bāḥusayn, *al-Furūq al-Fiqhiyyah wal-Uṣūliyyah*, (Riyadh: Maktabat al-Rushd, 1998), 18.

<sup>178</sup> Examples of these works are: *ʿIddat al-Burūq* by al-Wansharīsī al-Mālikī, *al-Furūq al-Fiqhiyyah* by Abul-Faḍl al-Dimashqī (d. in the fifth Hijrī century), *ʾIdāḥ al-Dalāʾil fīl-Farq Bayna al-Masāʾil* by ʿAbdurrahīm al-Zarīrānī (d. 741 / 1340).

<sup>179</sup> Al-Nadwī, *al-Qawāʿid*, 82.

of both prayer and fasting is that they are acts of worship, which require the body's involvement. Yet, they differ in this case, because if making up for the prayer is made compulsory upon women, it would be a burden on them, due to frequent performance of prayers throughout the year. Making up for fasting, in contrast, is not a burden upon women, because it is required only once a year.<sup>180</sup>

2. Plaited hair must be loosened when women make the compulsory bath when the menstruation period finishes. They are not to do so when making the bath for *janābah* (the state women and men are in after sexual intercourse). Both kinds of bathing are required for the validity of many acts of worship and are done in the same way. Yet, because the frequency of being in the state of *janābah* is usually more than that related to menstruation, the situation requires mitigation.<sup>181</sup>

3. Many scholars view that it is forbidden for young husbands to kiss their wives while fasting, whereas it is allowed for elderly persons. The *ṣūrah* (image) of kissing is identical in both cases, but because it may lead the former group to sexual intercourse, which breaks their fasting, it is *ḥarām* for them. For elderly husbands, due to natural weakness of desire, kissing is unlikely to do so.<sup>182</sup>

4. People are instructed to hold and protect free-roaming sheep until their owners take them back, while this is not the case with respect to free-roaming camels. The difference is that sheep if they are not caught and

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<sup>180</sup> Abu al-<sup>c</sup>Abbās Al-Wansharīsī, *‘Iddat al-Burūq fī Jam<sup>c</sup> Mā fil-Madhhab min al-Jumū<sup>c</sup> wal-Furūq*, ed. Ḥamzah Abū Fāris, (Beirut: Dār al-Gharb al-Islāmī, 1990), 103. See also: Wolfhart, "Structuring the Law" 339.

<sup>181</sup> Ibn Qudāmah Al-Maqdisī, *al-Mughnī*, (Beirut: Dār al-Fikr, 1405 A. H.), 1:143.

<sup>182</sup> Yahyā ibn Sharaf Al-Nawawī, *al-Majmū<sup>c</sup>*, (Beirut: Dār al-Fikr, 1997), 6:370.

kept are likely to fall prey to wild animals, such as wolves, whereas camels are likely to resist such animals. Besides, camels can stay without drinking or eating for several days, which is not the case for sheep.<sup>183</sup>

*Furūq* are also the cases that were, because of certain reasons, exempted from the general ruling of *qawā'id*. As is known, each *qā'idah* contains a general *ḥukm*, which is applicable to many similar particulars.<sup>184</sup> Yet, for some reasons, one or more of these particulars is exempted from the general *ḥukm*. For example, the silence of a virgin girl regarding her marriage is one of the particulars exempted from the *qā'idah* which says: *lā yunsabu li-sākit qawl* (No statement is imputed to a man who keeps silence). Shyness is usually what prevents such a girl expressing her approval verbally. It is, thus, what makes this particular to be excluded from the general *ḥukm* of the *qā'idah*. Al-Bakrī (was alive in 806 A.H.) wrote a book entitled *al-I'tinā' Fil-Farq Wal-Istithnā'* where he states the *qā'idah* first and then states the exempted cases. He, sometimes, does not mention the reason why such and such a particular is not included, which is apparently the main element in *furūq* literature.

*Furūq* literature is not limited to particulars only. It was also extended to more general principles, such as *qawā'id* and *naẓariyyāt* to specify the differences between some of them. *Al-Furūq* of Shihāb al-Dīn al-Qarāfī, the famous Mālikī jurist, is a distinguished work in this respect, where he discusses the *furūq* between five hundred and forty-eight *qawā'id*

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<sup>183</sup> Muhammad Ibn Idrīs Al-Shāfi'ī, *al-Umm*, Second Edition, (Beirut: Dār al-Ma'rifah, 1393 A.H.), 4:66.

<sup>184</sup> Al-Bāḥusayn, *al-Furūq*, 33.



and other *fiqhī* themes.<sup>185</sup> His approach represented a new development in the *qawā'id* literature.<sup>186</sup> Examples of the *furūq* presented in this book include the distinctions between *ijārah* (hire) and *bay'c* (sale), *ḥaḍanah* (custody) and *wilāyah* (guardianship), *shahādah* (testimony) and *riwāyah* (narration), and between *al-urf al-qawlī* (verbal custom) and *al-urf al-fi'li* (actual custom). The book, however, is not a pure *fiqhī* work, because it includes differences between *qawā'id uṣūliyyah*, grammar rules and, in some cases, between some rules of logic. Furthermore, it seems that his main effort is not to distinguish between the themes with respect to the general meaning each conveys, as everybody is assumed to know that *shahādah*, for example, is distinguished from *riwāyah*, because each has its own scope, although they are both reports in the first place. Instead, his concern mainly is to state the differences between the application side of each that may be seen to be identical to that of the other, and the conditions which have to be fulfilled for the full consideration of meaning and application of the theme. For example, when he mentioned the differences between *riwāyah* and *shahādah*, he stated the conditions for both terms, such as the number of people (witnesses or narrators), their gender, being slaves or not, etc., and different views regarding some of these conditions.<sup>187</sup> Furthermore, although the book is devoted to stating differences between principles, in many cases al-Qarāfī mentions distinctions between particulars calling them *qawā'id*. Take, for example, the distinctions between the one who is allowed to make *fatwā* and who is not,<sup>188</sup> the

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<sup>185</sup> cAtiyyah, *al-Tanzīr*, 131.

<sup>186</sup> Ibid.

<sup>187</sup> Al-Qarāfī, *Al-Furūq*, pp. 1: 74-91.

<sup>188</sup> Ibid., 2:550

forbidden and allowed backbiting,<sup>189</sup> dreams that are allowed to be interpreted and those which are not,<sup>190</sup> and so forth.

#### 1.5.4. *Al-Nazariyyāt Al-Fiqhiyyah*

*Al-nazariyyāt al-fiqhiyyah* (the general theories of *fiqh*) appear in the modern writings of *fiqh*, whose authors have been exposed to Western legal literature.<sup>191</sup> The *nazariyyāt* is an attempt to embrace a wider scope in *fiqh* through treating, comprehensively, an important area of it.<sup>192</sup> They are basically a kind of writing where a group of researches, rulings and subjects that form a single comprehensive legal idea are brought together in one place.<sup>193</sup> *Nazariyyat al-ʿaqd* (theory of contract), *nazariyyat al-ḍarūrah* (theory of necessity) and *nazariyyat al-milkiyyah* (theory of ownership) are some examples of the treated *nazariyyāt* in the modern legal context.<sup>194</sup>

Although *nazariyyāt* are a relatively recent development of *fiqh*, traditional jurists had presented their components within their legal works. For example, one can get a general and comprehensive picture of the nature of *ʿaqd* when one comes across the chapters of sale, marriage, hire, *waqf* (endowment), mortgage, etc, in the same manner targeted by *nazariyyat al-ʿaqd*.<sup>195</sup> Furthermore, many of *qawāʿid al-fiqh* were coined essentially to regulate and control the making of any kind of *ʿaqd*. Take, for example, the following *qawāʿid*. 1. *al-ikrāh yubṭil al-ʿaqd* (coercion nullifies the

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<sup>189</sup> Ibid., 4:1338.

<sup>190</sup> Ibid., 4:1373.

<sup>191</sup> Al-Rūḡī, *Nazariyyat al-Taḳīd*, 54. Al-Bāḥusayn, *al-Qawāʿid*, 147.

<sup>192</sup> Kamali, *Sharīʿah Law*, pp. 157-159.

<sup>193</sup> Al-Rūḡī, *Nazariyyat al-Taḳīd*, 54.

<sup>194</sup> Kamali, *Sharīʿah Law*, 158.

<sup>195</sup> Al-Rūḡī, *Nazariyyat al-Taḳīd*, 55.

contracts). 2. *al-ma<sup>c</sup>rūf bayna al-tujjār kal-mashrūṭ baynahum* (a matter which is recognized as customary amongst merchants is regarded as if agreed upon between them). 3. *Al-jahālah tubṭil al-<sup>c</sup>aqd* (ignorance – of the subject of a contract – nullifies it).<sup>196</sup>

Perhaps the reason why traditional *fuqahā<sup>ṣ</sup>* did not tend to engage in such kinds of legal writing was the practicality and dynamism of *fiqh*.<sup>197</sup> Most traditional *fiqhī* works, especially those compiled during the first three *Hijrī* centuries, were descriptions and statements of the legal rulings of actual cases. They tended not to give solutions to cases and problems that have not yet happened, although the Ḥanafis started this kind of writing later on, and were the first to present *fiqh* theoretically.

*Nazariyyāt* do not have the same meaning of *qawā<sup>c</sup>id*, as each have their own scope and discuss different subjects. Nevertheless, some contemporary writers – such as Muhammad Abū Zahrah, Yūsuf al-Qaradāwī, Muḥammad Yūsuf Mūsā and Aḥmad al-Khaṭṭābī, considered both as two names indicating one thing.<sup>198</sup> Abū Zahrah, for instance, said in his *Uṣūl al-Fiqh*, differentiating between *qawā<sup>c</sup>id al-fiqh* and *qawā<sup>ṣ</sup>id al-uṣūl*

“*uṣūl al-fiqh* is the root upon which the *furū<sup>c</sup>* (particulars) are built. When legal groups (of particulars) are formed, it becomes possible to gather them in rules and maxims. These rules are exactly the *nazariyyāt fiqhiyyah*”.<sup>199</sup>

The *nazariyyah* is wider in scope. It is, as stated above, a legal study that includes a group of researches and concepts that form one single legal

<sup>196</sup> Ibid., pp- 55-56.

<sup>197</sup> Ibid., 54.

<sup>198</sup> Al-Bāḥusayn, *al-Qawā<sup>c</sup>id*, 147. Al-Rūgī, *Nazariyyat al-Tqa<sup>c</sup>d*, pp. 52-53. Al-Nadwī, *al-Qawā<sup>c</sup>id*, 62.

<sup>199</sup> Muhammad Abū Zahrah, *Uṣūl al-Fiqh*, (Cairo: Dār al-Fikr al-<sup>c</sup>Arabī, nd), 10.

idea. A *qā'idah*, in this regard, may play the role of a *dābiṭ* or a controller of an aspect within the *naẓariyyah*. *Al-ikrāh yubṭil al-ʿaqd* (coercion nullifies the contract), for example, presents one of the conditions that have to be fulfilled for the valid contract.<sup>200</sup> However, some *qawā'id* are more general than the *naẓariyyāt* in terms of being used in many chapters of the *fiqh*, and also used in all the *naẓariyyāt*. *Al-yaqīnu lā yazūlu bi-l-shakk* (certainty is not overruled by doubt) for example, is used in all of the above mentioned *naẓariyyāt* as a controller.<sup>201</sup>

## 1.6. FUNCTIONS OF *AL-QAWĀ'ID AL-FIQHIYYAH*.

As stated in the introduction of the thesis (see section I.1. above, when stating the significance of the thesis subject), the genre of *al-qawā'id al-fiqhiyyah* is very important in *fiqh* literature. However, in order to evaluate the contribution of *al-qawā'id al-fiqhiyyah* to legal thought in general, one can refer to the semantic content of the word *qawā'id* on the one hand, and the connotation of the term of *al-ashbāh wal-naẓā'ir* (within the remit of which one finds *qawā'id al-fiqh*) on the other, because linguistic meanings can signify realities of the two terms. As such, the term *qawā'id* semantically means deep-rooted rules and principles, which have been formulated to encompass smaller components that share common legal ideas. Accordingly, *al-qawā'id al-fiqhiyyah* have been coined as a result of long experience in dealing with the particulars of *fiqh*, and after detailed readings of the rulings of *fiqh* on various themes. They are merely

<sup>200</sup> Al-Bāḥusayn, *al-Qawā'id*, pp. 149-150. Shubayr, *al-Qawā'id al-Kiulliyyah*, 25

<sup>201</sup> Shubayr, *al-Qawā'id al-Kiulliyyah*, 26.

principles, each of which includes various issues and questions of jurisprudence that have common legal determinations. They are described, in this regard, as *kulliyyāt*, which signifies their comprehensiveness and application to their particulars. On the other hand, the connotation of the term *al-ashbāh wal-naẓā'ir*, indicates their analogical nature to link future issues and questions to the issues whose legal rulings have already been determined.<sup>202</sup>

Now, functions of *qawā'id* are numerous, and they are actively present in a number of areas. The following will show in detail their most important tasks.

#### 1.6.1. Categorizing *Fiqh* Cases in General Principles.

The primary important function of *qawā'id al-fiqh* mentioned<sup>203</sup> is that they have enabled the jurists to have adequate knowledge of the different chapters of *fiqh* without the need to memorize all of the particulars. They achieve the task of categorizing cases of *fiqh*, which have similar legal determination; so much so, that were it not for them, *fiqh* would have remained scattered cases, without ideational connection between them.<sup>204</sup> One can imagine how huge is the number of *fiqh* particulars when one reads al-Bābartī al-Ḥanafī's (d. 786 / 1384) statement that *fiqh* issues recorded in the works of the Ḥanafīs were (up to his time) a million, one hundred and seventy thousand.<sup>205</sup>

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<sup>202</sup> See: al-Rūgī, *al-Qawā'id al-Fiqhiyyah Min Khilāl*, 121.

<sup>203</sup> Ibid., pp. 327-328. Al-Bāḥusayn, *al-Qawā'id*, pp. 114-115.

<sup>204</sup> Al-Zarqā, *al-Madkhal*, 2:967. See also: Khaleel, *The Islamic Law Maxims*, 191.

<sup>205</sup> See: al-Bāḥusayn, *al-Qawā'id al-Fiqhiyyah*, 115.

To give some examples: Aḥmad al-Zarqā (d. 1357 / 1938) in his *Sharḥ al-Qawā'id al-Fiqhiyyah* when discussing the universal *qā'idah* which says: “*lā ḍarara wa lā ḍirār*” (one should not cause harm, nor should he reciprocate harm with harm), he mentioned around 30 various cases to which this principle applies.<sup>206</sup> Likewise, he mentioned 18 particulars from different chapters of *fiqh* as examples of cases, which are encompassed under the *qā'idah* that stipulates that when a prohibition is removed, the thing to which such prohibition attaches reverts to its former status of legality: (*idhā zāla al-māni'u 'āda al-mamnū'u*).<sup>207</sup> Further, when discussing the *qā'idah*, which reads: “*al-jawāzu al-shar'iyyu yunāfi al-damān*” (Legal permission is incompatible with liability), he mentioned 15 different cases which fall under the remit of this rule.<sup>208</sup>

Therefore, *al-qawā'id al-fiqhiyyah* emerged to serve as general guidelines that articulated scattered particulars among the various schools of law. Joseph Schacht, in this context, noted that *qawā'id* are mainly terse, rhythmical, alliterative sayings that are the product of early systematic reasoning.<sup>209</sup>

During the development of *fiqh*, jurists produced *fiqh* literature in a fragmented style, as majority of them produced their works independently, and there were not any formal institutions or the like to unify the style of the jurists' presentations. At a later stage (starting from the mid-first / -seventh century when Islam spread outside the Arabian Peninsula, and

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<sup>206</sup> Aḥmad Al-Zarqā, *Sharḥ al-Qawā'id al-Fiqhiyyah*, Second Edition, (Damascus: Dār al-Qalam, 1989), pp. 166-174.

<sup>207</sup> Ibid., pp. 191-194.

<sup>208</sup> Ibid., pp. 449-451.

<sup>209</sup> Khaleel, “The Islamic Law Maxims”, p.192,

Muslims interacted with other nations) the number of particulars grew, and the need to articulate them in abstract statements was pressing.<sup>210</sup> Hence, *qawā'id* represent the peak of cumulative progress, which could not have been expected to take place at the formative stages of the development of *fiqh*.<sup>211</sup> However, the process of articulating particulars in *qawā'id* was launched at the very beginning of *fiqh* development. One can refer, to prove this, to early books, such as *al-Mudawwanah* of Mālik (d. 179 / 795), *al-Kharāj* of Abū Yūsuf (d. 182 / 798) and *al-Umm* of al-Shāfi'ī (204 / 819).<sup>212</sup>

Al-Qarāfī (d. 684 / 1285) in *al-Furūq* said, explaining the importance of *qawā'id* in categorizing *fiqh* particulars:

“These *qawā'id* are very significant in *fiqh* and very useful. ... Through them, beauty of *fiqh* becomes distinct and known, and approaches of *fatwā* are revealed.... The more a jurist comprehends them the more he becomes distinguished and honourable,... and whoever comprehends *fiqh* through its *qawā'id* does not need to memorize most of particulars, as they are embodied in the *kulliyyāt* (comprehensive maxims)”.<sup>213</sup>

Ibn Rajab al-Ḥanbalī (d. 795 / 1393), focusing also on this function of *qawā'id*, said :

“These are important maxims and great benefits. They control principles of the *madhhab* for jurists, and enable them to discover what might be hidden in the sources of *fiqh*. They also bring together for jurists the scattered issues in one place ...”<sup>214</sup>

Mohammad Hashim Kamali, in the same context, said:

“These genres of *fiqh* literature seek, on the whole, to consolidate the vast and sometimes unmanageable juris corpus of *fiqh* into brief theoretical statements. They

<sup>210</sup> See: Zakariyah, *Applications of Legal Maxims*, 59. Kamali, *Shari'ah Law*, 142.

<sup>211</sup> Ibid., 80.

<sup>212</sup> See: al-Nadwī, *al-Qawā'id*, pp. 94-103.

<sup>213</sup> Al-Qarāfī, *al-Furūq*, 1:3.

<sup>214</sup> Ibn Rajab, *al-Qawā'id*, 3. The translation of both quotations are my own.

provide concise entries into their respective themes that help to facilitate the task of both the students and practioners of Islamic law”.<sup>215</sup>

### 1.6.2. A Means to *Ijtihād*

*Al-qawā'id al-fiqhiyyah* are also very important in the area of *ijtihād*. They have enabled jurists to be capable of extracting rulings for unwritten and novel questions, as well as the legal determinations of the infinite future issues through their analogical nature.<sup>216</sup> Al-Suyūṭī says in this regard:

“Know that *al-ashbāh wal-naẓā'ir*, under which *qawā'id* are embodied, is a great sort of art. Through it, facts and secrets of *fiqh* can be learned, and a jurist becomes talented in remembering and understanding it, i.e. *fiqh*. He would also be able to extract rulings for unwritten issues and the infinite events”.<sup>217</sup>

However, because of the importance of *qawā'id* in this regard, a separate section will be dedicated to discuss their role in the area of *ijtihād* (see section 1.7. below).

### 1.6.3. Help to Have Knowledge About *Maqāṣid al-Sharī'ah*

*Al-qawā'id fiqhiyyah*, on the other hand, help jurists hold considered knowledge of *maqāṣid al-Sharī'ah* (the intentions and goals of the Sharia). Many of them are expressive, usually in a few words, of these *maqāṣid*,

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<sup>215</sup> Kamali, *Sharī'ah Law*, 142.

<sup>216</sup> Ibid. 27. Al-Nadwī, *al-Qawā'id*, 327.

<sup>217</sup> Al-Suyūṭī, *al-Ashbāh*, 6. The translation is mine.



which might not be achieved when dealing with the particulars separately.<sup>218</sup>

To give some examples, let us examine two of the five universal maxims. The first says: “*al-mashaqqah tajlib al-taysir*” (hardship begets facility), and the other says: “*lā ḍarara wa lā ḍirār*” (one should not cause harm, nor should he reciprocate harm with harm). Considering this, one can come to a conclusion that reducing hardship for the individuals - whenever it occurs - is intended by the lawgiver, either when performing the different *‘ibādāt* (acts of worship) or when dealing with others for the worldly daily life. Likewise, whenever and wherever it occurs, harm must be eliminated. This conclusion is not expected to be clear and reachable when one deals with particulars individually.

#### 1.6.4. Embody Many Principles and Values of the *Sharī‘ah*.

*Al-qawā‘id al-fiqhiyyah* embody within their sphere many of the *Sharī‘ah* principles and values. As such, amongst the five universal *qawā‘id fiqhiyyah* is the maxim, which reads: “*al-‘ādah muḥakkamah*” (custom can be the basis of judgments). This *qā‘idah* is on *‘urf* (custom), which Islamic legal theory granted a formal status, recognizing it as a legal principle of *Sharī‘ah* and a valid basis of judicial decision.<sup>219</sup>; thus a judge is authorized to base his verdict on custom in issues, which are not

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<sup>218</sup> Ibn ‘Ashūr, *Maqāṣid*, 6. See also: al-Bāḥusayn, *al-Qawā‘id*, 117. Kamali, *Sharī‘ah Law*, 142.

<sup>219</sup> Kamali, *Sharī‘ah Law*, 54.

regulated by a *naṣṣ* (clear text from the *Qurʾān* or the *Sunnah*).<sup>220</sup> Shacht said:

“Custom (*ʿurf*, *ʿādah*) is recognized as a restrictive element in dispositions and contracts and as a principle in interpreting declarations; it also serves occasionally as the basis of *istiḥsān* or *istiṣlāḥ*.”<sup>221</sup>

Hashim Kamali said also in this regard:

“The legal theory of *uṣūl* also recognizes approved custom (*ʿurf*) as a proof of *Sharīʿah* and a valid basis of judicial decision, especially in the area of *muʿamalāt* (transactions). Custom is essentially pragmatic as it is moulded directly by the experience, needs and conditions of society. Custom and *maṣlaḥah* also constitute the motivating factors behind many a ruling of *ijmāʿ* and *ijtihād*.”<sup>222</sup>

Likewise, the theory of *istiṣḥāb* has been expressed by a number of *qawāʿid*, which are all included under the remit of the second universal *qāʿidah* which says: “*al-yaqīnu lā yazūlu bi-l-shakk*” (certainty is not overruled by doubt). *Istiṣḥāb* means the continuation of the situation of a matter, whose existence or non-existence had been proven in the past, and which are presumed to remain so for lack of evidence to establish any change.<sup>223</sup> Take for example the following two *qawāʿid*:

1. *Al-aṣlu barāʾatu al-dhimmah* (freedom from liability is a fundamental principle).
2. *Al-aṣlu baqāʾu mā-kāna ʿalā mā-kān* (it is a fundamental principle that a thing shall remain as it was originally).

According to the first *qāʿidah*, if, for example, A claimed that he lent B a sum of money, presenting no evidence to support their claim, but B denied,

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<sup>220</sup> Ibid., 149.

<sup>221</sup> Shacht, *Introduction to Islamic Law*, 62.

<sup>222</sup> Kamali, *Sharīʿah Law*, 54.

<sup>223</sup> Kamali, *Principles*, 259.

the situation of the latter will be upheld because the normal state is the absence of any loan which can only be rebutted by presenting evidence. As for the second *qā'idah*, once a contract of marriage, for example, is concluded, it is presumed to remain in force until there is a change. Therefore, the marital status of the spouses is presumed to continue until dissolution of marriage can be established by evidence, and a mere possibility that the marriage might have been dissolved, is not enough to rebut the presumption of *istiṣhāb*.<sup>224</sup>

The principle of *sadd al-dharā'ī*<sup>c</sup> (blocking the means to evil) is also present in a number of *qawā'id*, which in turn serves the concept of *maṣlahah* (public interest). Take, for example, the *qā'idah* which reads: “*mā-yufḍī ilā al-ḥarāmi ḥarām*” (what leads to unlawful actions is also unlawful). Accordingly, marriage in Islamic law is *mandūbun ilayh* (recommended) in general, but if it leads the husband to do prohibited things, such as stealing, in order to provide his wife with required expenses and *nafaqah* (maintenance), marriage is then *ḥarām* (prohibited).<sup>225</sup> Likewise, the sale of grapes or other types of fruit is *mubāḥ* (permissible), but if it comes to the knowledge of the seller that the buyer is planning to make wine from the grapes, the sale then becomes *ḥarām*.

#### 1.6.5. Embody Ethical Values

*Al-qawā'id al-Fiqhiyyah* embody ethical values, substantially intended by the *Sharī'ah*. In this context, the main ideas of the five

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<sup>224</sup> Ibid.

<sup>225</sup> Ibid., 146.

universal *qawā'id* (discussed in detail in chapter three); namely: intention, certainty, removal of hardship, elimination of harm and custom) are mainly ethical and they are integral to the general Islamic concept of *maṣlaḥah*, besides – of course - their legal functions. This may reflect the strong relationship between law and morality in Islam. In this respect, *Sharī'ah* is seen to be based on a system of morality and can, therefore, handle many moral problems that arise in different fields from a legal perspective.<sup>226</sup>

Take, for example, the first *qā'idah* which says: “*al-umūru bimaqāṣidihā*” (matters are judged in light of the intention behind them). This *qā'idah* concerns the *niyyah* (intent), which is a fundamental concept of the whole of Islamic religious law. *Niyyah* plays dual roles: legal and moral. The former concerns the realization by the heart of the action to be done, which results in discharging the actor from a duty if it is intended, and vice versa. The moral role, on the other hand, is the actor's inner motive for their actions, based on which he may or may not gain *qabūl* (acceptance) by God of his actions, and subsequently His reward in the afterlife. Therefore, the moral function relates *niyyah* to *ikhlāṣ* (sincerity), which leads to God's pleasure. Accordingly, a matter, be it an action or an utterance, is accepted only if it is performed with proper intention, not on the basis of its outer appearance. It is valueless when it is done with ill-intention, even if it is good in nature and performed in complete accordance with the precepts of the law.<sup>227</sup>

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<sup>226</sup> See: Omar Hasan Kasule, *Medical Ethics from Maqasid Al Sharī'a* at: (<http://islamthought.wordpress.com/2008/12/14/medical-ethics-from-maqasid-al-shari%E2%80%9999a/>).

<sup>227</sup> Al-Ghazālī: *Iḥyā' 'Ulūm ad-Dīn*, 4:362. See also: Wensinck, A.J., “*Niyya*.” in: *Encyclopaedia of Islam*.

#### 1.6.6. Preserve *Shari'ah* in the Society.

*Qawā'id*, based on my own observations, play a remarkable role in preserving *Shari'ah* in the Arab societies (and perhaps all Muslim societies), and helps secure greater support for the law. Many *qawā'id* – especially those which embody ethical connotations – have, in different wordings, a noticeable presence in the speech of individuals, and seemingly play the role of proverbs, in terms of encouraging people to do pleasant things or acquire good manners. Furthermore, in many situations an individual may cite a popular saying, which is similar to or might be originally a *qā'idah fiqhiyyah*, to justify an action or to support an idea. For example, for explanation of enjoying an easier duty, be it related to the law or to daily life activities, individuals often say: “*al-dīn yusī*” (literally means: religion is easy), which is a mere paraphrasing of the universal *qā'idah* which says: *al-mashaqqah tajlib al-taysīr* (hardship begets facility). Likewise, individuals - to justify doing an action which resulted in liked or disliked consequences - they say: “*innamā al-a'mal bil-niyyāt*” (indeed all actions are based on the intention) to indicate that their motivation was sincere. Moreover, *qawā'id* have a significant presence in explaining procedures or situations, where *ʿādāt* (customs) are the basis of a judgment. *Hadhā huwa al-ʿurf* (this is according to custom), for example, is a statement which is often heard in the sessions of marriage contracts when discussing the amount of dowry which is to be given to the wife; this refers to the fifth of the universal *qawā'id*, which says: *al-ʿādah muḥakkamah* (custom can be the basis of judgment).

One can, however, guess the reasons behind the popularity of many *qawā'id fiqhiyyah* in the Arab societies. First, the large presence of preachers and religious figures in these societies who use, in their ceremonies, *qawā'id* and other sorts of legal and ethical principles for teaching and *da'wah* (call to adhere to Islam) purposes. Second, the ethical connotations that these *qawā'id* embody, created wide acceptance for them among individuals. Third, their brief and precise wordings make remembering them easy. Fourth, *qawā'id al-fiqh* may be in the midway between *fiqh* (which includes a large number of particulars that is beyond grasp, especially for those who are not specialized in legal studies) and *aqā'id al-sharī'ah* (a discipline which requires special considerations and qualities). Fifth, the tendency of individuals to seek a decisive argument, to support or justify their speeches, situations and actions with pieces of evidence, which embody religious connotations.

## 1.7. ROLE OF *AL-QAWĀ'ID AL-FIQHIYYAH* IN *IJTIHĀD*

### 1.7.1. General Overview.

As defined by Bernard Weiss, *ijtihād* is: “the process of extracting or deriving (*istinbāt*, *istithmār*) legal rules from the sources of the Law”.<sup>228</sup> The word is, linguistically, derived from the morpheme '*juhd*', which means 'expending of maximum effort in the performance of an act'. Wael Hallaq, considering this semantic connotation of the word, defined the term as: “the exertion of mental energy in the search for a legal opinion to the extent that

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<sup>228</sup> Bernard Weiss, “The Theory of *Ijtihād*”, in: *the American Journal of Comparative Law*, Vol. 26, No. 2, (Spring, 1978), pp. 199-212, p.200.

the faculties of the jurist become incapable of further effort”.<sup>229</sup> Therefore, *ijtihād* basically aims at finding feasible solutions to new issues, which have not been specifically addressed by the existing law.<sup>230</sup> Hence, it plays the role of dynamic force in legal studies. As stated by Weiss, it is primarily by virtue of the *ijtihād* of jurists that Islamic law exists at all as a body of positive rules.<sup>231</sup>

*Ijtihād*, however, is a very broad source of Islamic Law, as most sources rather than the *Qurʾān*, the *Sunnah* and *ijmāʿ* (consensus of jurists), such as *qiyās*, *istiṣlāḥ* (consideration of *maṣlāḥah*, or public interest), etc., are its manifestations; although its validity as a source of *fiqh* is acquired from the *Qurʾān* and the *Sunnah*, as many verses and traditions are quoted in support of it. Yet, since the function of *ijtihād* is to give Islamic law flexibility to treat and tackle new situations and issues where no clear text from the *Qurʾān* and the *Sunnah* is available, practicing it needs competent jurists, who have certain qualifications to achieve the intended goals.

For this reason, scholars laid down some requirements that a jurist must satisfy in order to practice *ijtihād* in the proper way.<sup>232</sup> Amongst them

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<sup>229</sup> Wael B. Hallaq, “Was the Gate of *Ijtihād* Closed? In: *International Journal of Middle East Studies*, Vol. 16, No. 1 (Mar., 1984), pp. 3-41, p.3

<sup>230</sup> Mohammad Hashim Kamali, “Issues in the Legal Theory of *Uṣūl* and Prospects for Reform” in: *Islamic Studies*, Vol. 40, No. 1 (Spring 2001), pp. 5-23, p.6.

<sup>231</sup> Weiss, “The Theory of *Ijtihād*”, p.201.

a. <sup>232</sup> See for the definition of *ijtihād* and the requirements which a jurist should have to be *mujtahid*: al-Samʿānī, *Qawāʿiʿ al-Adillah f-il-Uṣūl*, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1997), pp. 2:303-307. Al-Ghazālī, *al-Mustaṣfā Min ʿIlm al-Uṣūl*, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1413 A.H), pp. 1:342-346. Al-Shawkānī, *Irshād al-Fuḥūl*, (Beirut: Dār al-Fikr, 1992), pp. 1:419-428. Yūsuf al-Qardāwī, *al-Ijtihād Fi-l-Sharīʿah al-Islāmiyyah*, First Edition, (Kuwait, Dār al-Qalam, 1996), pp. 15-49.

are the following: 1. Mastery of the Arabic language. 2. A profound knowledge of the *Qurʾān* and the *Sunnah*, and capability of distinguishing strong from weak evidence. 3. An adequate knowledge of the issues upon which scholars have agreed, i.e. *ijmāʿ*. 4. A comprehensive knowledge of the interpretative principles of legal language (e.g. the imperative, ambiguous, metaphorical, general, and particular) and the methods of investigating the authenticity and transmission of texts, particularly *ḥadīths* (Prophetic traditions). 5. Knowledge of the theory of abrogation (*al-nāsikh wa al-mansūkh*), which includes a discussion as to whether and what texts repeal others. 6. Understanding of *maqāṣid* (intentions) of the *Sharīʿah* and *maṣlaḥah* (public interest). 7. Knowledge of one's own society and *ʿurf*. 8. Knowledge of legal maxims. 9. *Al-ʿadālah wa al-waraʿ* (Piety and devotion).

#### 1.7.2. Tools of *Ijtihād*: Triangle of *al-Qawāʿid al-Fiqhiyyah*, *Uṣūl al-Fiqh* and *Maqāṣid al-Sharīʿah*.

Although requirements for *ijtihād* seem numerous, most of them refer to *uṣūl al-fiqh*, *maqāṣid al-sharīʿah* and *al-qawāʿid al-fiqhiyyah*. As such, the first five abovementioned conditions (save number one) can be briefly summarized into knowledge of *uṣūl al-fiqh* (the science of legal methodology), since all of these elements are amongst the research subjects of *uṣūl*. The concept of *maṣlaḥah* and the doctrine of *maqāṣid al-sharīʿah* are quite similar. *ʿUrf* relates to, and is studied within, the scope of *al-qawāʿid al-fiqhiyyah*, *maṣlaḥah* and *uṣūl al-fiqh*. In brief, the three genres



are the most significant elements about which a jurist must have adequate knowledge to be qualified as a *mujtahid*.

Regarding *uṣūl al-fiqh*, it is a general apparatus concerned with the methodology to be followed for deducing legal rulings from sources of the law, i.e. the *Qurʾān*, the *Sunnah*, *ijmāʿ*, *qiyās*, etc.<sup>233</sup> It provides jurists with guidelines and criteria that they should follow, while making their efforts to find out the correct legal rulings for new problems based on the sources of *Sharīʿah*.<sup>234</sup> Legal reasoning, rules of interpretation, meaning and implication of commands and prohibitions are examples of the areas covered by *uṣūl al-fiqh*. Thus, as mentioned above, knowledge of various chapters of *uṣūl al-fiqh* is necessary for practicing *ijtihād*. The need for the methodology of *uṣūl al-fiqh* became apparent when unqualified persons attempted to carry out *ijtihād*, and the risk of error and confusion in the development of *Sharīʿah* became a source of anxiety for the scholars. Furthermore, *uṣūl al-fiqh* enables the jurist to ascertain and compare strength and weakness in , and to give preference to that ruling of , which is in close harmony with the *nuṣūṣ*.<sup>235</sup>

Knowledge of *maqāṣid al-Sharīʿah* is also necessary in the area of *ijtihād*. Al-Shāṭibī's (d. 590 / 1194) accentuated the knowledge of *maqāṣid* as a prerequisite of attainment of the rank of a *mujtahid*. He said:

“None to be qualified as *mujtahid* unless he entirely mastered *maqāṣid al-Sharīʿah*, and is capable of

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<sup>233</sup> Al-Nadawī, *al-Qawāʿid*, 69.

<sup>234</sup> Kamali, *Principles*, 13.

<sup>235</sup> Ibid., 14.

inferring legal provisions based on his understanding of *maqāṣid*.<sup>236</sup>

Ṭahir ibn ʿĀshūr (1393 / 1973), the author of another landmark work on the *maqāṣid* (entitled *Maqāṣid al-Sharīʿah al-Islāmiyyah*), has also confirmed that knowledge of the *maqāṣid* is indispensable to *ijtihād* in all of its manifestations. According to him, scholars who confined the scope of their *ijtihād* only to literal interpretations have found it possible to project a personal opinion into the words of the text and fell into error, as they were out of line with the general spirit and purpose of the surrounding evidence.<sup>237</sup>

The analogical nature of *qawāʿid* is designed to significantly reduce the effort of *mujtahids* (sing. *mujtahid*) in extracting legal rulings for new issues, which have not occurred in the past. To explain this, a *mujtahid* when practicing *qiyās* (legal reasoning) -in order to extract a proper legal ruling- needs to consider two things: first, he needs to recognize the *ʿillah* (effective cause) of the legal ruling of an original case which is already known and regulated by a given *naṣṣ* (a clear text from the *Qurʾān* or the *Sunnah* – traditions of the Prophet) in order to apply it to a new case; and second, he needs to verify whether or not this *ʿillah* is present in the new case, whose legal ruling is being extracted. Inferring a legal ruling from a *qāʿidah fihiyyah*, in contrast, requires only checking whether or not the new case is in the domain of the *qāʿidah*, which is similar to the second of

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<sup>236</sup> Al-Shāṭibī, *al-Muwāfaqāt*, 4:106.

<sup>237</sup> Ibn ʿĀshūr, *Maqāṣid*, 15-16. See also: Mohammad Hashim Kamali, “Maqāṣid al-Sharīʿah”: the Objectives of Islamic Law”, in: *Islamic Studies*, 38:2 (1999), pp. 193-208, p.205,

the above mentioned steps in the practice of *qiyās*.<sup>238</sup> For this reason, some scholars argued that *qawā'id* are even to be given priority over *qiyās*. According to them, *qiyās* originally is to attach a single issue (which has no clear legal determination) to another single issue (whose legal status has already been determined by the *Qur'ān*, the *Sunnah*, etc.), whereas the nature of *qawā'id* is to attach a single issue to several other issues, which already have legal status.<sup>239</sup>

One should, however, mention here that scholars, who considered knowledge of *qawā'id* per se amongst the requirements for *ijtihād* are not many. Yet, it is sufficient to prove the significance of them in this regard that al-Shafi'ī (d. 204 / 819), who first wrote on *uṣūl al-fiqh* and the requirements for legal reasoning, focused on the importance of grasping them in this regard, and that they must always be observed.<sup>240</sup> Furthermore, al-Subkī (d. 771 / 1370), whose book (*Jam' al-Jawāmi'*) is amongst the renowned works in this regard, counted knowledge of *qawā'id* as an essential condition for valid *ijtihād*.<sup>241</sup>

### 1.7.3. Role of *al-Qawā'id al-Fiqhiyyah* in Contemporary *Ijtihād*.

*Fiqh al-Nawāzil* is a term that refers to the intellectual process of finding out legal rulings, from the different sources of *fiqh*, for the novel

<sup>238</sup> See: Rashed al-Amiri, *Legal Maxims*, 85.

<sup>239</sup> Al-Khalifī, *al-Qawā'id al-Fiqhiyyah: Hujiyyatuhā*, pp. 311-314.

<sup>240</sup> Yūsuf Al-Qardāwī, *al-Ijtihād Fī-l-Sharī'ah al-Islāmiyyah*, (Kuwait, Dār al-Qalam, 1996), 45.

<sup>241</sup> Ibid.

events and issues that have no precedent. The term does not originally refer only to the new events of our modern times (i.e. the 20<sup>th</sup> or the 21<sup>st</sup> centuries); rather, it has been used by scholars in different ages to refer to finding out the legal rulings for issues new to them, which had not been dealt with by the scholars before them.<sup>242</sup> *Al-I'lam Bi-Nawāzil al-Aḥkām* by Abū al-Aṣḥab al-Asadī (d.486 / 1093), *al-Nawāzil* by ibn Rushd (d. 520 / 1126) and *Madhāhib al-Ḥukkām Fī Nawāzil al-Aḥkām* by al-Qādī 'Iyād (d. 544 / 1150) are examples of the works of *fiqh al-nawāzil* in the authors' different times and places.<sup>243</sup> Any issue, however, to be described as *nāzilah* (singular form of *nawāzil*) should be new (i.e. never discussed before), actual (i.e. should not be hypothetical), and the knowledge of its legal ruling is urgent and pressing.<sup>244</sup>

*Nawāzil* in our time are great in number, and vary according to the various aspects of life. They include issues in modern finance, medicine, education, politics, etc. Based on a principle in the *fiqh* literature, which indicates that every act of a Muslim must fall under one of five legal categories: *wajib*, *mandūb*, *mubāḥ*, *makrūh* or *ḥarām*, contemporary scholars have dealt with many of the significant *nawāzil* individually and collectively in conferences, and workshops held specifically to discuss them. For example, Muhammad al-Ashqar and three other colleagues from the Jordan university have written various pieces of research (around 30) on Islamic finance and contemporary issues and have published them altogether in two volumes under the title of *Buḥūth Fiqhiyyah fī Qaḍāya*

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<sup>242</sup> Muhammad Al-Jīzanī, *Fiqh al-Nawāzil: Dirāsah Ta'ṣīliyyah Taṭbīqiyyah*, Second Edition, (Dammām: Dār Ibn al-Jawzī, 2006), pp: 1:20-22.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid., pp. 1:22-23.

*Iqtiṣādiyyah Muʿāṣirah*. The work was published by Dār al-Nafāʾis in Amman in 1998. Furthermore, Ali al-Qarahdāghī and Ali al-Muhammadi wrote a book under the title of *Fiqh al-Qadāyā al-Ṭibbiyyah al-muʿāṣirah* where they collected many of their and others' pieces of research on contemporary medical issues from the Islamic perspective. The book is published by Dār al-Bashāʾir in Beirut in 2006.

In this regard, many pieces of research have been submitted to discuss new issues in almost every session of the Council of *Majmaʿ al-Fiqh al-Islāmī* (the Islamic *Fiqh* Academy) of the Organization of Islamic Cooperation (OIC). For example, amongst the issues discussed in the second session held in Jeddah in December 1985 were test-tube babies, milk banks, insurance and re-insurance, and the letter of guarantee.<sup>245</sup> Likewise, AIDS, currency issues, and calls for bids were amongst the issues discussed in the ninth session held in Abu Dhabi in April 1995.<sup>246</sup> Health insurance and legal rulings of Muslim minorities were amongst the issues discussed in the sixteenth session held in Dubai in April 2005.<sup>247</sup>

On the other hand, a large number of academic dissertations and theses have been submitted to tackle specific issues in a broader sense. The following are examples of these academic works: 1. *Huqūq al-Ikhtirāʿ wa-l-Taʿlīf fīl-Fiqh al-Islāmī* (patents and copyrights in Islamic Jurisprudence), a Master thesis by Ḥusayn al-Shahrānī submitted to Imām Muhammad ibn Saud University in Riyadh in 1993; 2. *Aḥkām al-Jirāḥah al-Ṭibbiyyah* (legal

<sup>245</sup> See: *Majallat al-Majmaʿ al-Fiqhī* (the journal of the *Fiqh* Academy), Vol. 2, No. 1:233; Vol. 2, No. 1:383; Vol. 2, No. 1:545; Vol. 2, No. 2:1035 respectively.

<sup>246</sup> See: *Majallat al-Majmaʿ*, Vol. 9, No. 1:65, 351; Vol. 3 No. 3:1650; Vol. 5 No. 3:1609; Vol. 8, No. 3: 9; Vol. 9, No. 1:65 respectively.

<sup>247</sup> See : resolution No. 149 (16 Ī 7) at: (<http://www.fiqhacademy.org.sa/qarat/16-7.htm>); resolution No. 151 (16 / 9) at: (<http://www.fiqhacademy.org.sa/qarat/16-9.htm>) respectively.

rulings for medical surgeries), a PhD thesis by Muhammad al-Mukhtār al-Shinqīṭī to the Islamic University of Medinah in 1993; 3. *Al-Tijārah al-Iliktrūniyyah Min Manẓūr al-Fiqh al-Islāmī* (the electronic commerce from the Islamic perspective), a Masters thesis by Ahmad Imdāḥ submitted to al-Ḥāj Lakhḍar university in Batnah (Algeria) in 2006; 4. *Athar al-Amrād al-Wirāthiyyah ʿAlā al-Ḥayāt al-Zawjiyyah* (impact of genetic diseases on marriage life), a Masters thesis by Manāl al<sup>c</sup>Ashshī submitted to the Islamic University of Gaza in 2008.

It seems, however, that modern financial and medical issues attracted the greatest concern in the discussions of contemporary scholars. For example, around 55 out of 117 resolutions of the Council of *Majmaʿ al-Fiqh al-Islāmī* from its 2<sup>nd</sup> session to its 12<sup>th</sup> session (from 1985 to 2000) were on financial and medical issues.<sup>248</sup> Furthermore, 46 out of 217 PhD theses registered or submitted to the Faculty of *Sharīʿah* of Imam Muhammad ibn Saud university in Riyadh in the period from 1987 to 2009 were on contemporary issues related to finance and medicine.<sup>249</sup> This should not be surprising, since both kinds of issues directly touch the daily life of individuals and the activities of business institutions. Thus, determining the legal ruling for such issues is demanded by individuals, especially to those who strive to keep their actions in accordance with the teachings of the *Sharīʿah* on the one hand, and by business and financial institutions seeking publicity and to earn a reputation, in order to carry on their activities in a way that satisfies large segments of individuals on the other.

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<sup>248</sup> See the resolutions of the *Majmaʿ* at: (<http://www.fiqhacademy.org.sa>). See this statistics at: (<http://www.scribd.com/doc/19237054/Resolutions-of-the-Council-of-the-Islamic-Fiqh-Academy>).

<sup>249</sup> See this statistics at: (<http://www.alukah.net/Sharia/0/9099/>).

Extracting legal rulings for *nawāzil* in the course of history has always been through the broad concept of *ijtihād*. In this context, *qiyās*, *istihsān*, *istiṣhāb*, *maṣlaḥah* are the most well-known ways and manifestations of *ijtihād*. Knowledge of *al-qawā'id al-fiqhiyyah*, as stated earlier (look at sections 1.3.1 and 1.3.2. above) is amongst the requirements, which have to be possessed by a jurist to practice *ijtihād*. Their analogical nature makes their usage very useful. Hence, one finds that jurists in different ages utilized them to extract legal rulings for the *nawāzil* in their times.

Contemporary Islamic scholarship makes use of *qawā'id* in the endeavor to determine legal rulings for various novel issues. This comes in the context of upsurge of interest in both the *maqasid* and *qawā'id al-fiqh* in contemporary times. Furthermore, many Muslim scholars think, in this regard, that the legal theory of *uṣūl al-fiqh* has not adequately responded to the demands of renewal and *ijtihād* in the era of statutory legislation. They thought that *uṣūl* is now studied mainly as an academic discipline that falls short of meeting the demands of *ijtihād*.

However, *qawā'id* are used by contemporary scholars to justify their *ikhtiyārāt fiqhiyyah* (preferred legal rulings) on specific issues. For example, when discussing the contract of *ta'mīn* (insurance), jurists who deemed such a contract as valid referred to the *qawā'id* of *ḍarūrah* (necessity) and of *ʿādah* (custom).<sup>250</sup> In many occasions, different parties use *qawā'id* to support their different views. For examples, there have been two views regarding the permissibility of organ transplantation, and both

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<sup>250</sup> ʿAṭīyyah ʿAdlān Ramḍān, *Mawsūʿat al-Qawā'id al-Fiqhiyyah al-Munazzimah Li-l-Muʿāmalāt al-Māliyyah al-Islāmiyyah*, (Alexandria, Dār al-ʾImān, 2007), 214.

parties use different *qawā'id* as evidence to support their position.<sup>251</sup> In some situations, both parties used the same *qā'idah* in justifying their preference. For example, jurists differed with regard to the permissibility of repairing ruptured hymens of virgin girls, and both sides use the universal *qā'idah* of intention (i.e. *al-umūru bi-maqāsidihā*) from which to support their view, of course, from different angles, as will be shown later on (see chapter 5, section 5.6 below).<sup>252</sup>

Be that as it may, use of *qawā'id* in modern times for extracting legal rulings was mainly through collective *ijtihād* in conferences and seminars. In this context, a number of papers were presented in a conference held in the University of Ghardaya in Algeria in February 2011 discussing Islamic economics. Examples of papers included the following: 1. *al-Dawābiṭ wal-Qawā'id al-Shar'iyyah li-l-Mu'āmalāt al-Māliyyah al-Mu'āṣirah* (legal maxims and rules for modern financial transactions) by Ismā'il Khālidī. 2. *Al-Qawā'id al-Fiḥiyyah wa Atharuhā fī-l-Mu'āmalāt al-Māliyyah* (impact of legal maxims on financial transactions) by Mahmūd Mhaidāt. (3. *Qawā'id al-Si'ah wal-Murūnah wa-Taṭbiqātuhā al-Iqtisādiyyah* (maxims of latitude and flexibility and their applications to economic issues) by Anas Ghbāriyyah.<sup>253</sup> In the area of medicine, a seminar was held in Riyadh in 2008 for application of *qawā'id fiḥiyyah* to medical issues, where around 12 papers have been presented, yet have not been published.<sup>254</sup> Amongst

<sup>251</sup> See the different views and argumentations in: Muhammad al-Shinqīṭī, *Aḥkām al-Jirāhah al-Ṭibbiyyah*, Second Edition, (Jeddah, Maktabat al-Ṣaḥābah, 1994), pp. 354-391.

<sup>252</sup> Ibid., pp. 428-434.

<sup>253</sup> See respectively: (<http://iefpedia.com/arab/?p=25065>); (<http://iefpedia.com/arab/?p=25106>); (<http://iefpedia.com/arab/?p=25404>).

<sup>254</sup> The seminar was sponsored by the Department of the Religious Awareness which relates to the municipality of Riyadh, Saudi Arabia in 1429 A.H. (2008). See: ([http://www.alssunnah.com/main/articles.aspx?article\\_no=2317](http://www.alssunnah.com/main/articles.aspx?article_no=2317)).



these papers are the following: 1. “*Taṭbīq al-Qawāʿid al-Fiqhiyyah ʿAlā Masāʾil al-Takhdīr al-Muʿāṣirah*” (application of legal maxims to contemporary issues in anesthetization) by ʿAb al-Salām al-Ḥaṣīn. 2. “*Qāʿidat ā Ḍarara wa lā Ḍirāra Wataṭbīqātuhā al-Ṭibbiyyah*” (application of the maxim which says: “let there be no infliction of harm nor its reciprocation” to medical issues) by ʿĀyid al-Shahrānī. 3. “*Athar al-Qawāʿid al-Fiqhiyyah fī Bayan Aḥkām al-Jirāḥāt al-Tajmīliyyah*” (impact of legal maxims on extracting legal determination for cosmetic surgery) by ʿIyād al-Sulamī.

Academic works are also present in this regard; for example, 1. *Al-Qawāʿid al-Fiqhiyyah al-Munazzimah Lil-Muʿāmalāt al-Māliyyah al-Islāmiyyah* (legal maxims which organize Islamic financial transactions) by ʿAtīyyah ʿAdlān Ramḍān, a masters thesis submitted to Alexandria University in 2006;<sup>255</sup> 2. *Al-Taṭbīqāt al-Fiqhiyyah li-Qāʿidat al-Yasīr Mughtafar fil-Buyūʿ* (application of a maxim which says: “little (mistakes, misuse, etc.) are forgiven” to issues in the chapter of sale) by Hākyā Bin Muhammad Kārunitsh, a masters thesis submitted to Imam Muhammad ibn Saud University in Riyadh in 2009;<sup>256</sup> 3. *Al-Qawāʿid al-Kullīyyah al-Kubrā wa-Atharuhī fil-Muʿāmalāt* (universal maxims and their application to transactions) by Omar Kāmil, a PhD thesis submitted to al-Azhar University in 2009.<sup>257</sup>

Furthermore, journal essays have also had a remarkable contribution in this concern. To give some examples: 1. “Management Concepts and

<sup>255</sup> Alexandria: Dār al-Īmān, 2007.

<sup>256</sup> The thesis is still unpublished. See: (<http://iefpedia.com/arab/?p=7075>).

<sup>257</sup> Cairo: Dār al-Kutubī, 2010.

Islamic Legal Maxims: an Analysis of Selected Uṣūl al-Fiqh and al-Qawā'id al-Fiqhiyyah", by: Y. Ismail, and A. Abozaid, in: Issues in Islamic Management : Theories and Practices, IIUM Press, Kuala Lumpur (2007), pp. 69-78. 2. "Shari'ah Maxims and their Implication on Modern Financial Transactions" by: Abu Umar Faruq Ahmad and others, in: Journal of Islamic Economics, Banking and Finance, Vol. 6, No. 3 (2003). 3. Qā'idat al-Darūrāt Tubīḥ al-Maḥdūrāt wa-Taṭbīqātuhā fī-l-Fiqh al-Islāmī, by Ḥasan Khaṭṭab, in: Majallat al-Uṣūl wal-Nawāzil, Jeddah, No. 2, 1430 A. H.), pp. 145-136.

Let us examine some *qawā'id* to see how they are significant for *ijtihād*. First, a well-known *qā'idah* reads: "*al-taṣarruf 'alā al-ra'īyyah manūṭ bi-l-maṣlaḥah*" (Management of the public or citizens must be governed by the public interest). The original implication of this *qā'idah* is concerned with the management of the *ḥākim* (governor) on the public, for he has to take into consideration the welfare of the public when making any decision. The meaning of the word *ra'īyyah*, or the public, however, is wide so as to mean all members of the society, yet it can also be specific as to mean members of modern institutions, such as the members of a firm or members of a government department. As such, the jurist can apply this *qā'idah* to the decisions made by the manager of a certain company (for instance, he must be fair to his employees in the formulation of staff policies or assigning work). He should also take into consideration the development of the employees as individuals, as well as contributors toward the achievement of the organization's mission. On the other hand, depending on the wide meaning of the word *ra'īyyah*, he ought to consider

the welfare of the people external to the firm, who get benefits from his company, be they consumers or others. Therefore, he is required to take actions that will further the interests of society.<sup>258</sup>

Similarly, a *mujtahid* can make use of the *qā'idah*, which says: “*al-kitāb ka-l-khiṭāb*” (meaning: correspondence resembles conversation) to conclude the validity of a sale contract or a divorce, which is sent via an email, an SMS or other sorts of modern electronic means of communication. The traditional examples given for this *qā'idah* relate to commercial contracts, such as sale, hiring, mortgage, etc. Jurists said in this context that such sorts of contracts were originally carried on verbally, when two parties or more made an agreement on a sale or a hire of something in words. Because literacy expanded in societies, and the need for documentation became important to preserve rights of the individuals, contracts can also be binding in written forms.<sup>259</sup> Therefore, a *mujtahid* in contemporary times can argue about the necessity of accepting the different sorts of electronic communication as ways of documentation, which should also be binding and result in whatever consequences.

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<sup>258</sup> See: Y. Ismail, and A. Abozaid. (2007). *Management Concepts and Islamic Legal Maxims: An Analysis of Selected 'Uṣūl Al-Fiqh and Al-Qawā'id Al-Fiqhiyyah Books*, International Conference on Management from Islamic Perspectives (ICMIP-2007), Organized by Department of Business Administration, KENMS, IIUM, at Hilton Kuala Lumpur, Malaysia, 15-16 May.:

<sup>259</sup> See: Ḥaydar, *Durar al-Hukkām*, 1:61

CHAPTER TWO

HISTORICAL DEVELOPMENT OF THE  
DISCIPLINE OF

*AL-QAWĀ'ID AL-FIQHIYYAH*

## CHAPTER TWO

### HISTORICAL DEVELOPMENT OF THE GENRE OF *AL-QAWĀ'ID AL-FIQHIYYAH*

#### 2.1. INTRODUCTION.

Works on the history of Islamic legal theory, either by Muslim or non-Muslim authors, have rarely mentioned the historical development of *qawā'id* literature.<sup>1</sup> °Alī al-Nadwī in his *al-Qawā'id al-Fiqhiyyah* (2007) labelled this as 'a strange matter', which led to difficulty and hardship for any researcher seeking to determine the exact era in which *qawā'id* emerged.<sup>2</sup> Perhaps the reason was that *qawā'id* are basically abstract legal statements, derived from the detailed reading of the *fiqh*; moreover, each one was formulated to encompass issues in the law, which share a common legal idea in order to facilitate keeping them in the mind. Therefore, their historical development, in general, is parallel to that of the *fiqh* itself and, consequently, may not require separate consideration.

However, a few *qawā'id* books comprise sections, which deal with their history of development. This might be justified in the classical works, since their main concern is the application of *qawā'id* on the *fiqh* particulars, and they rarely discuss the theoretical and historical aspects of the discipline.<sup>3</sup> In modern times, few authors also have dealt with this

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<sup>1</sup> See for example: Mannā° al-Qaṭṭān, *Tārīkh al-Tashrī° al-Islāmī*, °Abd al-°Azīm, Sharaf al-Dīn, *Tārīkh al-Tashrī° al-Islāmī*, N. J. Coulson, *A History of Islamic Law*.

<sup>2</sup> Al-Nadwī, *al-Qawā'id*, 89.

<sup>3</sup> Perhaps the only exception here is the classifications of *qawā'id* in terms of their scope of application on particulars. They have been categorized as universal, *kullīyyāt* and *ḍawābiṭ* or special *qawā'id* by a number of scholars, such as al-Subkī, al-Suyūṭī and Ibn Nujaym in

important subject. Perhaps the only innovative academic works in this regard are the books of Dr. Ali al-Nadwī and Dr. Yaḥyā al-Bāḥusayn, both titled *al-Qawāʿid al-Fiqhiyyah*.<sup>4</sup> On the other hand, the PhD thesis entitled, *Legal Maxims in Islamic Jurisprudence, Their History, Character and Significance* (submitted by Rashed al-Amiri to the University of Birmingham in 2003) is, as far as I know, the sole work in English, with a dedicated section, of about 90 pages, on the emergence and development of *qawāʿid*.<sup>5</sup>

Therefore, this chapter is dedicated to the discussion of the historical development of this discipline. The presentation will also include, as a significant part, detailed analytical comment on the most used and renowned works on *qawāʿid* in the course of describing the history and development in the form of a chronological bibliography.

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their books (all titled *al-Ashbāh wal-Nazāʾir*). In addition, on many occasions some authors did mention that a particular *qāʿidah* was first uttered by such and such persons, be they the Prophet (BPUH), a companion, or a leading figure. Examples will be mentioned in the following chapters.

<sup>4</sup> The book by al-Nadwī was originally a Masters thesis submitted to Umm al-Qurā University in Makkah in 1984. I have the book in its seventh edition, published in Damascus by Dār al-Qalam in 2007. Work of al-Bāḥusayn, on the other hand, was intended to be a comprehensive academic reference on the theoretical aspects of *qawāʿid*, and was first published by Maktabat al-Rushd in Riyadh in 1998. Not to forget, in this regard, Muṣṭafā al-Zarqā wrote some pages on history of *qawāʿid* in his *al-Madkhal al-Fiqhī al-ʿAm* and in the introductory chapter of his father's book, which is a commentary on the *qawāʿid* of *Majallat al-Aḥkām al-ʿAdliyyah* entitled as *Sharḥ al-Qawāʿid al-Fiqhiyyah*. See: Muṣṭafā al-Zarqā, *al-Madkhal al-Fiqhī*, pp. 2:969-976, Ahmad al-Zarqā, *Sharḥ al-Qawāʿid al-Fiqhiyyah*, pp. 36-44.

<sup>5</sup> There is also a small section on the history of *qawāʿid* in the PhD thesis of Luqman Zakariyah, which was submitted to the University of Wales, Lampeter in 2009, titled *Applications of Legal Maxims in Islamic Criminal Law with Special Reference to Shari'ah Law in Northern Nigeria (1999-2007)*, pp. 38-49. Hashim Kamali in *Shari'ah Law: An Introduction* has also given a short mention of the history of *qawāʿid* in three pages, pp. 152-154.

Generally speaking, tracing the ascription of each single *qā'idah* to the person who first uttered or formulated it is difficult, and in many cases impossible.<sup>6</sup> Muṣṭafā al-Zarqā says in this regard,

“*Qawā'id* were not all formulated at a particular time in history by particular persons in the same manner as the modern legal texts, ... nor can they be ascribed to particular jurists, with the exception of *qawā'id* whose wordings were, originally, Prophetic traditions ... or statements of the leading scholars or their disciples”.<sup>7</sup>

However, since *al-qawā'id al-fiqhiyyah* is now and has been for a long time a distinct discipline with its own framework and structure, it certainly emerged and developed gradually over a number of phases. Being overlapped with *fiqh* may make it difficult to give the precise date of its emergence as a separate subject, although many have firmly asserted that it could not have been expected to have emerged at the early stages of the development of *fiqh*.<sup>8</sup> However, final wordings of *qawā'id* have appeared after huge processes of refinement, editing and modification in later centuries by scholars of different schools. Justifying the preferred juridical rulings and ways of *al-istidlāl al-qiyāsī* (the analogical proving) played a significant role in the wording of *qawā'id* after the formation and establishments of schools, when scholars devoted themselves to editing, arranging and refining their principles and legal sources.<sup>9</sup>

According to al-Nadwī, whose abovementioned work is pioneering in this regard, the science of *qawā'id* developed gradually and went through

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<sup>6</sup> Al-Zarqā, *al-Madkhal*, 2:969.

<sup>7</sup> Ibid.

<sup>8</sup> Al-Bāḥusayn, *al-Qawā'id*, 289.

<sup>9</sup> Ibid. See also: Mawil Izzi Dien, *Islamic Law From Historical Foundations To Contemporary Practice*, (Edinburgh: Edinburgh University Press Ltd., 2004), 114.

three major stages; namely, the emerging and foundation stage, the stage of development and recording, and the stage of establishment and arrangement.<sup>10</sup> Al-Bāḥusayn, following a more specific approach, and considered recording and compiling *qawā'id* in separate books as the distinguishing criterion. Accordingly, he divided their history into three major stages; the pre-compiling stage, the compiling stage, and the modern stage.<sup>11</sup> Al-Amiri in his PhD thesis, although cleverly benefiting from the classification of both writers, focused more on the historical development of *qawā'id* as a distinct discipline. He, in this context, distinguished between *qawā'id* before and after their formalization into a discipline. For the former stage, his discussion mainly focused on proving that the emergence of the *qawā'id* was during the lifetime of the Prophet (BPUH), and in the short period following his demise, i.e. during the time of his companions and their *tābi'ūn* (followers). He stated a considered number of *Qur'ānic* verses, Prophetic traditions and sayings of the Companions or the leading imams. These have been considered, due to their comprehensive nature, as *qawā'id*, since they can encompass many law particulars. On the other hand, he mentioned three stages that he thought *qawā'id* experienced after their formalization into a distinct discipline. They are the primitive, florescence, and mature stages.<sup>12</sup>

As stated earlier, *qawā'id al-fiqh*, have gone through different phases of development. For a better conception, however, one needs to distinguish between *qawā'id* as a legal phenomenon and the construction of

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<sup>10</sup> Al-Nadwī, *al-Qawā'id*, 89.

<sup>11</sup> Al-Bāḥusayn, *al-Qawā'id*, pp. 283-286.

<sup>12</sup> Al-Amiri, *Legal Maxims*, pp. 98-168.



a distinct discipline. The appropriate criterion for this distinction is the compilation of *qawā'id* separately in exclusive books or even short treatises. Hence, the discussion here will follow this categorization.

## **2.2. QAWĀ'ID AS A LEGAL PHENOMENON.**

Many statements of a comprehensive nature have been reported and quoted from the very beginning of the development stages of *fiqh*. Some were *Qur'ānic* verses, Prophetic traditions or speeches of some of the Companions, the Followers and the leading imams of the schools of law. Whether or not some of these statements were deemed *qawā'id fihiyyah* in the technical sense, their existence was amongst the topics discussed by the abovementioned researchers and others in their academic works. Thus, the treatment here will also include these statements, but hopefully with a new methodological approach. However, since *fiqh* is a crucial element in this regard, the discussion here will be subdivided into two major subjects related to the compilation of *fiqh*, as follows.

### **2.2.1. Qawā'id Before the Compilation of *Fiqh*.**

#### **2.2.1.1. Qawā'id During the Lifetime of the Prophet (PBUH).<sup>13</sup>**

Many contemporary researchers maintain that the actual emergence of *qawā'id* can be traced back to the era of the Prophet (PBUH).<sup>14</sup> To support their argument, they cite several *Qur'ānic* verses and Prophetic

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<sup>13</sup> These letters stand for: peace be upon him; a phrase which is recommendedly written or uttered after any mention of the Prophet. As such, it will appear throughout the thesis.

<sup>14</sup> See: al-Nadwī, *al-Qawā'id*, pp. 90-92. Al-Rūgī, *Nazariyyat al-Ta'q'id*, 87. Al-Zarqā, *al-Madkhal al-Fiqhī*, 2: 969. Al-Amiri, *Legal Maxims*, 88. Bakr Ismā'īl, *al-Qawā'id al-Fiqhiyyah Bayna al-Aṣālah Wal-Tawjīh*, (Cairo: Dār al-Manār, 1997), 18. Zakariyah, Luqman, *Applications of Legal Maxims*, 38.

traditions, which have a comprehensive legal nature.<sup>15</sup> For example, the *Qurʾān* says, “So whosoever does good equal to the weight of an atom shall see it. And whosoever does evil equal to the weight of an atom shall see it”.<sup>16</sup> These two verses, according to this group of writers, are of broad connotation with regard to consequence of obedience and disobedience, so much so that the Prophet himself described them as *jāmiʿah fādhdhah* (inclusive and unique).<sup>17</sup> The *Qurʾān* in another place says, “Allah burdens not a person beyond his scope”,<sup>18</sup> which is, according to them, a legal principle that encompasses many particulars in the area of removing hardship. As for the Prophetic traditions, many of them are also of inclusive nature that encompasses varieties of details and particulars. For example, the Prophet (PBUH) said, “*inna li-ṣāhibi al-ḥaqqi maqālan*” (indeed, the owner of the right has a say), which has made a significant contribution to the law of claim and legal procedure.<sup>19</sup> This group of researchers also mentioned some traditions whose wordings per se were utilized by the jurists to express legal principles and stand themselves as *qawāʿid*. For example, the *qāʿidah*, which says, “*al-kharāju bi-l-damān*” (revenue and responsibility go together), and the other, which says “*al-bayyinatu ʿalā al-muddaʿī wal-yamīnu ʿalā man ankar*” (the burden of proof is on the one who alleges, and oath is on the one who denies); both are from the category of *al-qawāʿid al-kulliyyah*, and are nonetheless also Prophetic traditions.

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<sup>15</sup> Al-Rūḡī, *Nazariyyat al-Taḳwīd*, pp. 88-96. Al-Nadwī, *al-Qawāʿid*, pp. 90-92. Al-Jazāʾirī, *al-Qawāʿid al-Fiqhiyyah*, pp. 173-174.

<sup>16</sup> *Sūrat al-Zalzalah*, 7-8.

<sup>17</sup> Al-Rūḡī, *Nazariyyat al-Taḳwīd*, 88.

<sup>18</sup> *Surat al-Baqarah*, 286.

<sup>19</sup> Al-Nadwī, *al-Qawāʿid*, 92. Luqman, *Applications of Legal Maxims*, 39.

On the other hand, other contemporary researchers held the view that despite the fact that the sacred *nuṣūṣ* are the fundamental sources of *fiqh* and that many of the *nuṣūṣ* are of comprehensive nature, they do not represent the actual commencement of the discipline of *al-qawāʿid al-fiqhiyyah*. This is simply because one of the main functions of *qawāʿid* is to regulate the extensive amount of *fiqh* particulars through grouping them into more general principles in order to facilitate keeping them in the mind. This function, accordingly, could be possible only when the particulars already existed, so that the scholars can find a common legal ruling among a set of particulars in order to formulate out of their legal content a more comprehensive rule that is applicable to them all. This process, according to this group, is among the activities of *ijtihād*, which took a long period of time to be established, and could be carried on only after *fiqh* flourished, which is after the demise of the Prophet (PBUH).<sup>20</sup> Yaʿqūb al-Bāḥusayn (1998) said in this regard,

“It is logical that the establishment of *qawāʿid fiqhiyyah* is to be after the establishment of *fiqh* and after its particulars and issues become various and multiple, something which would call the intention of the jurist and motivate him to find out the general ideas that connect them”.<sup>21</sup>

Therefore, *qawāʿid*, being principles, each of which is applicable to a number of issues under a single legal idea, could not have been expected to be coined at the early stages of the development of *fiqh*.<sup>22</sup>

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<sup>20</sup> Al-Bāḥusayn, *al-Qawāʿid*, pp. 288-289.

<sup>21</sup> Ibid., 288.

<sup>22</sup> Ibid. See also: Kamali, *Sharīʿah Law*, 142.

Although both arguments seem to be logical, one should consider the essential functions of *qawā'id* in order to determine whether or not the actual instigation of them can be traced back to the time of the Prophet (PBUH). As stated several times within the chapters of this thesis, the main function of *qawā'id* is to reduce the particulars of *fiqh* into more general legal principles; each of which has a legal ruling that can be applied to a set of these particulars, which results in facilitating the comprehension of them and, subsequently, serve to fix them in the mind. As such, they have enabled the jurists to have adequate knowledge of the different chapters of *fiqh*. On the other hand, *qawā'id*, because of their analogical nature, are also very beneficial in enabling jurists to extract rulings for expected questions and infinite future issues.<sup>23</sup>

Considering the first mentioned function of *qawā'id*, one tends to prefer the view that the actual commencement of *qawā'id* should be sought after the demise of the Prophet (PBUH). This is because to group scattered things in more organised and comprehensive sets requires prior existence of these scattered things. For the purpose of illustration, one can make a comparison between the nature of *qawā'id* and that of the proverbs. A proverb is a known and repeated saying, which may express a truth, but generally is based on the practical experience of the people in a society. It should have resulted from a number of real incidents, which lead to the formation of its idea as a coined phrase in order for the past, present or future incidents (which had or have the same idea or resulted in similar experience) to be included within its content. For example, the English

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<sup>23</sup> Ibid. 27. Al-Nadwī, *al-Qawā'id*, p. 327.

proverb, which says, “All that glisters is not gold” is metaphorically intended to teach a lesson that not everything is what it appears to be. It ought to have been said after several people had experienced situations when they were really deceived by shining objects thinking they were gold, but found that they were not, and that they might even have spent money or stretched their personal finances to gain them. This is how it should be in relation to the *qawā'id fiqhiyyah*. For example, the *qā'idah* which says, “*mā ḥaruma akhduhu ḥaruma i'tā'uh*” (when it is forbidden to take a thing it is also forbidden to give it) should have been coined to gather the already existing particulars, which indicate its legal idea. Hence, it is forbidden to give money for usury or as a bribe in the same way that it is forbidden to take it, and it is forbidden for a person to give someone a glass of wine, exactly as it is forbidden to consume it themselves, and so forth.<sup>24</sup>

Moreover, the *Qur'ānic* verses and the Prophetic traditions are the essential source from which the legal rulings are deduced. Hence, they, in the eyes of the *fuqahā'*, are not legal rulings themselves, but the sources for the legal rulings. Consequently, they would not be considered *qawā'id fiqhiyyah*, since *qawā'id*, in the first place, are general legal rulings. On the other hand, although the Prophet (PBUH) laid down the foundations of the *fiqh* and trained his companions on how to deduce the rulings from the sources. Indeed, he, himself embarked on utilizing the *nūṣūṣ* for this purpose by practising *ijtihād* on many occasions. However, the number of *fiqh* particulars was not as large at that early time as to demand reducing them into more comprehensive legal principles. Therefore, *qawā'id* should

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<sup>24</sup> See: al-Zarqā, *Sharḥ al-Qawā'id*, 215.

be expected to exist in a later stage after the demise of the Prophet (PBUH). However, this should not contradict the fact that the wordings of some *qawā'id* are nothing but Prophetic traditions without any kind of refinement or editing, as in the case of “*al-kharāju bil-damān*” (revenue and responsibility go together), and “*al-bayyinatu ʿalā al-muddaʿī wal-yamīnu ʿalā man ankar*” (the burden of proof is on whom who alleges, and oath is on whom who denies). This might be because jurists, while coining particular legal principles, found that the words of such traditions are accurate statements, which express exclusively and exactly the legal idea of these principles; so they preferred them over their (the jurists’) own expressions. The proof of this could be sought the other way around, when the jurists, in formulating certain *qawā'id*, used more general words than the words of the traditions, which have almost the same meaning as these *qawā'id*. For example, the first of the five universal *qawā'id* says, “*al-umūru bi-maqāṣidihā*” (matters are judged in light of the intention behind them). The jurists used the word “*al-umūr*” (matters) rather than the word “*al-aʿmāl*” (deeds) in a tradition which says, “*innamā al-aʿmāl bil-niyyāt*” (Deeds (their correctness and rewards) depend upon intentions). The tradition expresses almost the same meaning of the *qā'idah*; yet still the word “*al-umūr*” is used because it is inclusive of *al-aqwāl wa al-aʿmāl* (deeds and utterances), which are all judged, based on other *nuṣūṣ*, in light of the intention behind them.

On the other hand, taking into consideration the analogical nature of *qawā'id*, which has great impact on their other function, as was mentioned above (i.e. they help to extract the rulings of the expected questions and

infinite future issues). Hence, the holy *nuṣūṣ* of comprehensive nature can be considered *qawāʿid* in this respect. To give some examples, the Prophet says, “*mā askara kathīruhu fa-qalīluhu ḥarām*” (if a large quantity of any substance intoxicates, a small quantity of it is prohibited), which gives in few words the criteria to be considered to determine which of the various drinks are deemed intoxicants, and consequently are to be prohibited.<sup>25</sup> The Prophet also said, “*kullu sharṭin laysa fī kitābi Allah laysa bi-sharṭ*” (any condition which is not present in Allah’s book is invalid); hence, whatever conditions people introduce or invent in future in their transactions should be weighed in accordance with this criterion in order to be valid.

#### 2.2.1.2. *Qawāʿid* in the Era of the Companions and the Followers.

According to many researchers, the foundations of *fiqh* were established during the lifetime of the Prophet (PBUH). It was the duty of the *Ṣaḥābah* of the Prophet to deduce the legal rulings for the new issues from the sources of the law endorsed by him, i.e. the *Qurʾān*, the *Sunnah*, and *ijtihād*. The Sunni Muslims believe that the *Ṣaḥābah* had done a perfect job and many of them were capable jurists, who were well trained by the Prophet (PBUH) in discharging this duty. ʿĀʾishah, the Prophet’s wife, ʿUmar ibn al-Khaṭṭāb, ʿAbd Allah ibn ʿAbbās, ʿAlī ibn Abī Ṭālib and Muʿādh ibn Jabal were amongst the *Ṣaḥābah* known for their expertise in *fiqh* and in producing *fatwā* (legal opinion).<sup>26</sup> The period of the *Ṣaḥābah* witnessed the spread of Islam outside the Arabian Peninsula, and resulted

<sup>25</sup> Al-Nadwī, *al-Qawāʿid*, 91.

<sup>26</sup> Shoayb Ahmad, *The Development of Islamic Jurisprudence (Fiqh) and Reasons for Juristic Disagreement among Schools of Law*, a Masters thesis submitted to the University of South Africa, (November, 2005), 40.

in Muslims interacting with other nations. Many new issues emerged, which had not been treated by the Prophet (PBUH), and needed legal rulings. The *Ṣaḥābah* were required to find solutions to such new questions.<sup>27</sup> New sources of *fiqh* emerged in this time, i.e. *ijmāʿ* and *qiyās*.<sup>28</sup> Therefore, *fiqh* particulars started gradually to increase, which required the formulation of general rules to control them, and to encompass the future similar particulars within their contents. This was, according to some researchers, the real initiation of *qawāʿid* literature, as many inclusive legal principles were formulated during this time, and ascribed to particular figures among the *Ṣaḥābah*.<sup>29</sup> To give some examples, it was reported that a case was brought before ʿUmar ibn al-Khaṭṭāb, where a man married a woman who made it a condition that she stay in her own house and not to move her husband's, to which the husband agreed. The man after some time wanted the wife to move to his house, but she refused, adhering to the condition. ʿUmar's rule was in her favour, and replied to the complaint of the husband saying, "*maqāṭiʿu al-ḥuqūqi ʿinda al-shurūʿ*", which means that the enjoyment of the basic rights can be suspended if there was a condition. It was also reported that ʿUmar said, "*lā ʿafwa fī-l-ḥudūdi ʿan shayʿin minhā baʿda an tablughā al-imām*" (entitlement to pardon is cancelled when a *ḥadd* violation is brought before the authorities). ʿAbdullah ibn ʿAbbās has also been quoted saying, "*kull shayʿin fīl-Qurʾāni: aw, aw, fahwa mukhayyar*" (in the Qurʾān, every injunction in

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<sup>27</sup> ʿAbdulkarīm Zaydān, *al-Madkhal li-Dirāsāt al-Sharīʿah al-Islāmiyyah*, Fourth Edition, (Alexandria: Dār ʿUmar Ibn al-Khaṭṭāb, 1969), 118. Shoayb Ahmad, *The Development of Islamic Jurisprudence*, 37.

<sup>28</sup> Mannāʿ al-Qaṭṭān, *Tārīkh al-Tashrīʿ al-Islāmī*, Fifth Edition, (Cairo: Maktabat Wahbah, 2001), 191.

<sup>29</sup> Al-Bāḥusayn, *al-Qawāʿid*, 289.



which many things are joined together with the conjunctive particle “or” is an indication that a free choice is allowed among these things). Moreover, Ali ibn Abī Ṭālib said, “*man qāsama al-ribḥa falā ḍamāna ‘alayh*” (a profit shareholder is not liable for any loss).<sup>30</sup>

Many inclusive legal principles were also attributed to some of the *Tābi‘ūn* (followers of the companions), many of whom were accomplished scholars of *fiqh* and *fatwā*. Their legal activities were considered as a sequel of those of the *Ṣaḥābah*, as both eras were complementary to each other and represented the second stage in the development of *fiqh*.<sup>31</sup> In this regard, many statements were ascribed to al-Qāḍī Shurayḥ (d. 78 / 697) and deemed *qawā‘id fiqhiyyah*. For example, he said, “*man ḍamina mālan fālahu ribḥuh*” (one is entitled to get the revenue of a thing for which they are legally liable in case of its loss), which originated from the *ḥadīth*, which says, “*al-kharaju bil-ḍamān*” (revenue and responsibility go together). He also said, “*man sharaṭa ‘alā nafsīhi ṭā’i‘an ghayra mukrahin fahwa ‘alayh*” (one is to fulfil whatever conditions he willingly imposed on himself). Ibrāhīm al-Nakha‘ī (d. 96 / 715) is also said to have coined some comprehensive legal rules. For example, he is of the opinion that a drunk is liable and responsible of whatever he utters, be it divorce, manumission, vow, swearing, etc. He said expressing this view, “*mā takallama bihi al-sakrānu min shay’in jāza ‘alayh*”. He also said, “*kullu qarḍin jarra naf‘an fahwa ribā*” (every loan which brings a benefit to the creditor is considered

<sup>30</sup> Ibid., pp. 290-292. Al-Nadwī, *al-Qawā‘id*, 92.

<sup>31</sup> Shoayb Ahmad, *The Development of Islamic Jurisprudence*, 37.

usury); although this statement has also been attributed to ibn Sīrīn (d. 110 / 728 ).<sup>32</sup>

One can notice from the quotations above that a post of judge has a significant impact on *qawā'id* formulation. Among the names mentioned earlier, ʿUmar ibn al-Khaṭṭāb, Ali ibn Abī Ṭālib and al-Qāḍī Shurayḥ were all judges (ʿUmar and Ali became caliphs later on). Moreover, all of the five statements attributed to these three imams relate to issues of transactions between people, and not something relating to acts of worship, which may indicate that they formulated them while they were in judicial office.

However, the contents of the abovementioned legal statements and the like were not necessarily agreed upon by all schools of law; nor are they all genuine *qawā'id fiqhiyyah* in the technical sense. The point here is to prove that the formulation of *qawā'id* commenced in the early stage of development of *fiqh*. For example, the statement of Ibrāhīm al-Nakhaʿī that a drunk person is responsible for whatever he utters is not unanimously accepted by scholars. In this context, although the majority of scholars held that divorce by a drunk person is effective, a number of scholars in the past and present viewed it as invalid.<sup>33</sup> On the other hand, the statement of ʿAbdullah ibn ʿAbbās mentioned above<sup>34</sup> is, as a matter of fact, a *qa'idah uṣūliyyah* rather than a *qā'idah fiqhiyyah*, since it implies a linguistic rule, which helps to deduce legal rulings from the *Qurʾān*.

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<sup>32</sup> Al-Nadwī, *al-Qawā'id*, pp. 93-94 . Al-Bāḥsayn, *al-Qawā'id*, pp. 293-297.

<sup>33</sup> See: *al-Mawsū'ah al-Fiqhiyyah*, 29:16.

<sup>34</sup> That is, "*kullu shay'in fil-Qurʾāni: aw, aw, fahwa mukhayyar*" (in the Qurʾān, every injunction in which many things are joined together with the conjunctive particle "or" is an indication that a free choice is allowed among these things).

### 2.2.2. *Qawā'id* During the Early Stage of Compiling *Fiqh*.

The compilation of *fiqh* started in the second *Hijrī* century (from A. D. 720 on).<sup>35</sup> According to some researchers, *Kitāb al-Majmū'* by Zayd ibn °Alī (d. 122 / 740) was the first *fiqhī* work, while others thought that *al-Kharāj* of Abū Yūsuf (d. 182 / 798), the disciple of Abū Ḥanīfah (d. 150 / 767), was the first exclusive *fiqhī* book.<sup>36</sup> Be that as it may, *fiqh* in this particular time started to have its own structure and framework, and was separated from other disciplines, such as *ḥadīth* and *tafsīr*. Different schools of law were established, each of which adopted, in deducing the law from its sources, specific methods and principles, many of which are peculiar and independent of the other schools and scholars, which resulted in disagreement on *furū'* (*fiqh* particulars). In this regard, two main tendencies emerged; namely, *ahl al-ḥadīth* (partisans of traditions) and *ahl al-ra'y* (partisans of opinion).<sup>37</sup> The former laid emphasis on tradition as their standard for legal solutions, while the latter resorted to personal opinions.<sup>38</sup> The later stages witnessed the emergence of more schools, although, generally speaking, these were wider reflections of either *ahl al-ḥadīth* or *ahl al-ra'y*. However, perhaps the most important event in this stage of *fiqh* development was the emergence of the science of *uṣūl al-fiqh*, regardless of who first introduced it, whether al-Shāfi'ī (d. 204 / 819) or Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189 / 805), the student of Abū

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<sup>35</sup> °Abdul-°Azīm Sharaf al-Dīn, *Tārīkh al-Tashrī'*, Third Edition, (Cairo: Dār al-Ma°ārif, 1985), pp. 184-185.

<sup>36</sup> See: Al-Bāḥusayn, *al-Qawā'id*, 298.

<sup>37</sup> Sharaf al-Dīn, *Tārīkh al-Tashrī'*, 162.

<sup>38</sup> Kamali, *Shari'ah Law*, 69.

Ḥanīfah. *Uṣūl al-Fiqh* has had the greater impact on *fiqhī* thought as a whole in the broader sense.<sup>39</sup>

The main outcome of this legal mosaic was the huge amount of *fiqh* particulars extending to a great variety of themes. In this regard, it was said that Abū Ḥanīfah treated around five hundred thousand issues in his life.<sup>40</sup> The expansion of Islam into new lands and societies, as well as the development in a new lifestyle amongst the Muslims might be the main reasons for the emergence of issues and questions, which had not been tackled in the previous stages of *fiqh* development.<sup>41</sup> Scholars seem to have resorted to formulating more general and inclusive legal principles to facilitate the treatment of the increasing number of *fiqh* particulars. This may justify the presence of *al-qawā'id al-fiqhiyyah* scattered within the multiple chapters of the early *fiqhī* works. However, referring to some of these books, one may notice that the main objectives of mentioning *qawā'id* were either to provide further explanation of particular legal rulings or to justify the *ikhtiyārāt fiqhiyyah* (preferred juridical rulings). They are also used as ways of *al-istidlāl al-qiyāsī* (the analogical proof approach).<sup>42</sup>

To give some examples, in *al-Majmū'c* of Zayd ibn 'Alī, "*lā shuf'cata illā fil-'aqāri aw fil-arḍ*" (the pre-emption right is exclusive to real estate or pieces of lands). Zayd mentioned this inclusive principle in the context of giving a general idea about the right of *shuf'cah* (pre-emption), answering a question asked by his student Abū Khālid al-Wāsiṭī, which was, "*mā al-*

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<sup>39</sup> Sharaf al-Dīn, *Tārīkh al-Tashrī'c*, 185.

<sup>40</sup> Al-Bāḥusayn, *al-Qawā'id*, 115.

<sup>41</sup> Shoayb Ahmad, *The Development*, pp. 52-53

<sup>42</sup> Al-Bāḥusayn, *al-Qawā'id*, 298.

*shuf‘ah?*” (what does pre-emption mean).<sup>43</sup> Abū Yūsuf said (choosing from the different views within the Ḥanafī school of law about determining the *ta‘zīr* - discretionary punishment), “*al-ta‘zīru ilā-l-imāmi ‘alā qadri ‘izami al-jurmi wa-ṣigharih*” (it is left to the leader or judge to decide an appropriate discretionary punishment considering the proportionate (nature) of the offence).<sup>44</sup> In the context of explaining a Prophetic tradition on personal property, Abū Yusuf also said, “*laysa li-l-imāmi an yukhrija shay‘an min yadi aḥadin illā bi-ḥaqqin thābitin ma‘rūf*” (it is not allowed for the Imam (leader) to take away someone's property without an established and well-known right).<sup>45</sup> This is seen to be the origin of the inclusive *qā‘idah* in *Majallat al-Aḥkām al-‘Adliyyah*, which says, “*al-qadīmu yutraku ‘alā qidamih*” (things which have been in existence from time immemorial shall be left as they were).<sup>46</sup> It may also serve as a good example to apply the other *qā‘idah* in the *Majallah* in the area of *al-siyāsah al-shar‘iyyah*, which says, “*al-taṣarrufu ‘alā al-ra‘iyyati manūṭun bil-maṣlahah*” (management of citizen's affairs is dependent upon public welfare).<sup>47</sup> In his *Kitāb al-Umm*, al-Shāfi‘ī (d. 204 / 819) has also mentioned several *qawā‘id* and used them to serve one of the mentioned objectives. For example, in a chapter titled “*al-ikrāhu wamā fī ma‘nāh*” (coercion and the like), he mentioned some legal rulings relating to the coerced person, forced to utter words of disbelief under the threat of death. He said that the *kufr* (disbelief) leads to a number of special legal rulings, such as divorcing the

<sup>43</sup> Zayd ibn Ali, *Musnad al-Imām Zayd*, (Beirut: Dār al-Kutub al-‘Ilmiyyah, n.d.), 249.

<sup>44</sup> Ya‘qūb Abū Yūsuf, *al-Kharāj*, Third Edition, (Cairo: al-Maṭba‘ah al-Salafiyyah, 1382 A. H.), 167. See also: al-Nadwī, *al-Qawā‘id*, 94.

<sup>45</sup> Abū Yūsuf, *al-Kharāj*, pp. 65-66.

<sup>46</sup> Al-Nadwī, *al-Qawā‘id*, 95.

<sup>47</sup> Al-Bāḥusayn, *al-Qawā‘id*, 300.

wife, execution, etc. but since Allah has pardoned him, he is also exempted from all of these consequences, because, “*al-a<sup>c</sup>ẓamu idhā saqāṭa ʿan al-nāsi saqāṭa mā huwa aṣgharu minh*” (when a greater thing fails, smaller things resulting from it also fail).<sup>48</sup>

It is stated above that final wordings of *qawāʿid* are the result of an extensive process of refinement, editing and modification in the later stages by scholars in different schools. However, a number of *qawāʿid*, which were proven to have been first formulated by some leading imams in this stage of *fiqh* development, have remained as they were first uttered without any (or with limited) refinement. For example, in *Kitāb al-Umm*, al-Shāfiʿī said while stating some issues relating to *ijmāʿ*<sup>c</sup>, “*lā yunsabu ilā sākitin qawl*” (No statement is imputed by to a man who maintains silence).<sup>49</sup> The *Majallah* uses the same wording of this *qāʿidah*. However, due to the many issues where silence may strongly reflect consent and admission, jurists of the *Majallah* committee attached another sentence to the *qāʿidah* in order to include them within it.<sup>50</sup> In this context, al-Khaṭṭābī (d. 388 / 998) in *Maʿālim al-Sunan* and al-Zarkashī (d. 794 / 1392) in *al-Manthūr* mentioned that Al-Shāfiʿī was the one who first coined the *qāʿidah*, which says, “*idhā ḍāqa al-amru ittasaʿ*” (Latitude should be afforded in the case of difficulty),<sup>51</sup> which is precisely the *qāʿidah* number 17 in *Majallat al-Aḥkām*. Muhammad ibn al-Ḥasan al-Shaybānī in his *Kitāb al-Aṣl* mentioned a *qāʿidah* in the area of *ḍamān*, which is also in the *Majallah*

<sup>48</sup> See: al-Nadwī, *al-Qawāʿid*, 100.

<sup>49</sup> Ibid., 101.

<sup>50</sup> The new wordings for the *qāʿidah* are as follows: *Lā yunsabu ilā sākitin qawlun, lākin al-sukūtu fī maʿridi al-ḥājati bayān*, (No statement is imputed by to a man who keeps silence, but silence is tantamount to a statement where there is a necessity for speech). See: al-Zarqā, *Sharḥ al-Qawāʿid*, 337.

<sup>51</sup> See: al-Nadwī, *al-Qawāʿid*, 103; al-Bāḥusayn, *al-Qawāʿid*, 302.

almost word for word. He said, “*lā yajtami‘u al-ajru wal-ḍamān*” (remuneration and liability to make good loss do not run together).<sup>52</sup>

## 2.3. QAWĀ‘ID AS A DISTINCT DISCIPLINE.

### 2.3.1. Introduction.

Although the second and third / eighth and ninth centuries were the law-making era of Islamic scholarship, the collection of *al-qawā‘id al-fiqhiyyah* in separate written works commenced only in the following century, i.e. the fourth / tenth century. However, legal conceptions of *qawā‘id* were known to the leading figures of the *madhāhib* (schools of law) and their disciples.<sup>53</sup> This is why they enjoy a remarkable presence in the books of the early *fuqahā’*, such as *al-Kharāj* of Abū Yūsuf, *al-Aṣl* of al-Shaybānī and *al-Umm* of al-Shāfi‘ī. As stated in the last section, due to comprehensive and analogical nature of the *qawā‘id*, these scholars used them, mainly, to justify their *ikhtiyārāt fiqhiyyah* (preferred legal rulings) or for the purpose of *ijtihād*.<sup>54</sup>

The question which is most likely to be raised here is, why did compiling *qawā‘id* in separate dedicated books commence later than other law-related disciplines. It seems very likely that two major factors were the main reasons that prevented scholars from collecting *qawā‘id* into distinct and exclusive compiled works. First, the involvement of scholars in the establishment of schools; and second, the weighty endeavour of deriving

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<sup>52</sup> See: Al-Zarqā, *Sharḥ al-Qawā‘id*, 431. al-Nadwī, *al-Qawā‘id*, 99.

<sup>53</sup> Al-Zarqā, *al-Madkhal*, 2:269. Al-Bāḥusayn, *al-Qawā‘id*, 310.

<sup>54</sup> Al-Zarqā, *al-Madkhal*, 2:269.

legal rulings to address new issues and questions. A brief historical review would allow further elaboration.<sup>55</sup>

As is known, several intensive scientific activities relating to law took place in the second and third / eighth and ninth centuries. Indeed, the emergence and development of the different schools of law were amongst the most important events of that time (only four of these schools survived until the present time, as others were short-lived). Part of the main duties of the leading figures of all schools (requiring them to spend much time and effort) was to verify *adillah* (sources), so as to determine that set from which law is to be deduced, based on certain considerations. Therefore, the main concern of scholars at the time, was the establishment of schools based on well-rooted and recognised foundations. Although all schools share a common legal theory and, eventually, agreed on particular sources, each adopted peculiar and independent methods, which, as stated above, required much time and effort from the leading scholars to defend their preferences, and respond to objections of others, allowing little room for other activities.<sup>56</sup>

In giving examples, one can refer to the famous letter of Mālik to al-Layth ibn Saʿd (d. 175 / 791) of Egypt, in which he defended his view regarding the adoption of *ʿamal ahl al-madīnah* (the consensus of the scholars of Madīnah) as one of the sources. al-Layth's responded to this

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<sup>55</sup> See: Abū Bakr al-Ḥiṣnī, *al-Qawāʿid*, ed. ʿAbd al-Raḥmān al-Shaʿlān, (Riyadh: Maktabat al-Rusd, 1997), the introductory chapter of the editor, 39.

<sup>56</sup> Al-Bāḥusayn, *al-Qawāʿid*, 310. See also: Zakariyah, *Application of Legal Maxims*, 42.



letter by explaining his objections to the matter.<sup>57</sup> Similarly, al-Shāfi'ī wrote a whole chapter in his book, *al-Umm* under the title of “*Kitāb Ibtāl al- Istiḥsān*” (the chapter annulling *istiḥsān* - i.e. juristic preference), where he criticised *istiḥsān* (which is basically a Ḥanafī doctrine and is also upheld by the Mālikī and Ḥanbalī schools); he considered this as a form of arbitrary indulgence in personal preferences, which should be avoided.<sup>58</sup> On the other hand, while the Qur'ān, the *Sunnah*, the *ijmā'*, and *qiyās* have all been accepted by the vast majority of scholars as sources of the law, others have not. *Istiḥsān*, for example, was the subject of long controversy among schools in terms of its validity as a source of law. Hashim Kamali said,

“Whereas the proponents of *istiḥsān* have seen it as a means of opening the *aḥkām* of *Shari'ah* to considerations of equity, *maṣlaḥah* and necessity, the opponents of *istiḥsān* have seen it as a means of circumventing the *aḥkām* on grounds merely of personal preference and opinion.”<sup>59</sup>

*Istiḥsān* has also been perceived differently from one school to another.

Kamali also said,

“The leading *madhāhib* have perceived *istiḥsān* somewhat differently from one another. Whereas the Mālikī jurist ibn al-ʿArabī (d. 534 / 1139) has simply described *istiḥsān* as acting on the stronger of two evidences (*aqwā al-dalīlayn*), the Ḥanafī jurist al-Jaṣṣāṣ (d. 370 / 980) defined it as departure from a ruling of *qiyās* in favour of another ruling, which is considered preferred”.<sup>60</sup>

<sup>57</sup> See: Muhammad Abū Zahrah, *Mālik*, Second Edition, (Cairo: Dār al-Fikr al-ʿArabī, 1952), pp. 127-139.

<sup>58</sup> Mohammad Hashim Kamali, *Istiḥsan and the Renewal of Islamic Law*, International Institute of Advanced Islamic studies (IAIS), Malaysia, 8. See: (www.iais.org.my)

<sup>59</sup> Ibid.

<sup>60</sup> Ibid., 1.

On the other hand, because of the spread of Islam outside Arabia, and the interaction of Muslims with other nations, significant new issues emerged, which demanded great endeavour to find out the appropriate legal rulings for them, which could suit different environmental and social conditions. Due to the fact that specific *nuṣūṣ* from the *Qurʾān* and *Sunnah* are of a limited nature, scholars turned to *ijtihād* in its variety of forms (such as *qiyās*, *istiḥsān*, *istiṣhāb* and *maṣlaḥah*) to present solutions to constant issues in light of the general rules of the *Sharīʿah*. This required much effort and time, but represented a real manifestation of the *fiqh* diversity among different schools of law, since the process demanded involvement of various considerations in allocating the sources of law upon which determined legal rulings were based. The effort of scholars in deducing rulings for new issues resulted, necessarily, in the formulation of many *qawāʿid fihiyyah*. However, the scholars' involvement in the abovementioned activities distracted them from collecting these *qawāʿid* into separate books, which started later on, as will be explained in the next section.

Now, because the approaches followed in compiling books of *qawāʿid* were different, discussion here will be divided into four sections, each of which is distinguished by particular features, as we will see later. The fact, however, is that no single traditional book was devoted exclusively to discussing *qawāʿid* in the technical sense, although many of them have this term in their titles. Rather, all were inclusive of *qawāʿid*, different legal rulings, and /or linguistic, theological, and *uṣūlī* rules.

### 2.3.2. *Qawā'id* from the Fourth / Tenth to the End of the Sixth / Twelfth Centuries.

*Qawā'id al-fiqh* started to gain popularity and began to be compiled separately around the middle of the fourth / tenth century. According to al-Nadwī in his *al-Qawā'id* (2007), the reason behind this is that the idea of *qafl bāb al-ijtihād* (the closure of the gate of *ijtihād*) started to gain ground late in the third / ninth centuries and developed gradually within the next few decades.<sup>61</sup> By the beginning of the fourth / tenth century, the norm of *taqlīd* (imitation) flourished, so much so that most scholastic activities started to be confined to explanation, interpretation, application and editing of legal doctrines and views of earlier scholars and imams. *Taqlīd* had positive facets, which were manifested in many important activities, amongst which was the doctrine of *takhrīj al-masā'il*, i.e. the deduction of rulings for new issues from the sources adopted by the *mujtahids* and leading figures of the *madhāhib*. It is admittedly seen that through *takhrīj* the scope of *fiqh* expanded and developed. Furthermore, jurists started to produce *fiqh* in different arts and styles depending on similarities and differences between issues and questions. Genres, such as *qawā'id*, *furūq*, *ḥiyal* (see footnote 165 in section 1.5.2 above), etc., gained popularity since then.<sup>62</sup>

However, although one can agree that *taqlīd* has had a significant role in the expansion of *fiqh*, one cannot agree with the idea that the gate of *ijtihād* was closed, both in theory and in practice. From the perspective of

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<sup>61</sup> Al-Nadwī, *al-Qawā'id*, 133.

<sup>62</sup> Ibid.

theory, *ijtihād* is indispensable in legal theory, because it is the only means by which jurists can discover legal rulings for new questions in the different ages. Further, *ijtihād* demands several requirements to be practised properly. An exposition of these requirements shows that they are not difficult to be met by any jurist who wishes to be involved in such intellectual activity.<sup>63</sup> With the passage of time, the requirements of *ijtihād* become easier. For example, in the early stages of *fiqh* development (around the second / eighth and third / ninth centuries) to know whether or not a prophetic tradition is authentic, it sometimes demanded from a jurist two months of travelling to meet and test some of the tradition's narrators. In later stages, books of traditions were expanded, and encyclopaedias of traditions' narrators were available, where the majority of narrators were examined and qualified accordingly. In practice, *ijtihādī* has always been exercised in reality in nearly all ages and places, and countless jurists have been described as *mujtahids* in different times and various countries. It may be quite enough to mention that ʿIzz al-Dīn ibn ʿAbd al-salām (d. 660 / 1262), his student ibn Daqīq al-ʿĪd, the latter's student ibn Sayyid al-Nās and the latter's student Zayn al-Dīn al-ʿIrāqī (who all lived after the assumed time of the closure of the gate of *ijtihād*, i.e. the beginning of the fourth / tenth century) were all known as *mujtahids*, who mastered all knowledge branches deemed to come under the requirements of *ijtihād*, and had practiced it in reality. In this regard, al-Zarkashī in *al-Baḥr al-Muḥīṭ* says that no two persons can disagree that ibn ʿAbd al-Salām and ibn Daqīq

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<sup>63</sup> Wael Hallaq, "Was the Gate of Ijtihād closed?" in: *International Journal of Middle East Studies*, Vol. 16, No. 1 (Mar., 1984), pp. 3-41, pp. 3-4.

al-<sup>c</sup>Id had attained the rank of *mujtahid*.<sup>64</sup> Moreover, *Majma<sup>c</sup> al-Fiqh al-Islāmī* (International *Fiqh* Academy) in Jeddah is one of the institutions for collective *ijtihād* in our modern times.

Be that as it may, scholars of different schools recognise that the earliest written collection of *qawā'id* is the *al-Uṣūl* by *al-Karkhī* (d. 340 / 951), which is a collection of 38 maxims.<sup>65</sup> Nevertheless, according to a story narrated by al-<sup>c</sup>Alā'ī al-Shāfi'ī (d. 761 / 1360) in his *al-Majmū<sup>c</sup> al-Mudhhib* and al-Suyūṭī in *al-Ashbāh wal-Nazā'ir* and others mentioning that the Ḥanafī scholar Abū Ṭāhir al-Dabbās, who was a contemporary scholar of al-Karkhī,<sup>66</sup> was the first who collated the first set of *qawā'id*, a collection of seventeen *qā'idah*.<sup>67</sup> For many reasons, many researchers doubted the authenticity of the story,<sup>68</sup> describing it as strange and seemingly fabricated,<sup>69</sup> an anecdote,<sup>70</sup> an apocrypha,<sup>71</sup> or closer to a myth.<sup>72</sup> What may

<sup>64</sup> Yūsuf al-Qardāwī, *al-Ijtihād fī-l-Sharī'ah*, 88.

<sup>65</sup> Al-Zarqā, *al-Madkhal*, 2:971. Al-Nadwī, *al-Qawā'id*, 136. Al-Bāḥusayn, *al-Qawā'id*, 316. However, not all biographers and historians counted this treatise amongst al-Karkhī's works, including those who lived in the next century, such as Ibn al-Nadīm (d. 438 / 1047) in *al-Fihrist*, al-Khaṭīb al-Baghdādī (d. 463 / 1071) in *Tarikh Baghdad* and al-Shīrāzī (d. 476 / 1083) in *Ṭabaqāt al-Fuqahā'*. In contrast, Brokelmann in *Tarikh al-Adab al-<sup>c</sup>Arabī* ascribed it to him saying that the manuscript is available in Rampur Raza Library. See: al-Bāḥusayn, *al-Qawā'id*, pp. 316-317.

<sup>66</sup> Al-Zarqā, *al-Madkhal al-Fiqhī*, 2:971.

<sup>67</sup> The story says that the Ḥanafī scholar Abū Ṭāhir al-Dabbās (d. 340 / 951) collected the underlying rules of the Ḥanafī school into seventeen principles to which the whole *madhhab* could be reduced. Abū Sa'id said that a Ḥanafī scholar from the city of Harat heard about this and travelled to al-Dabbās. The latter was blind and used to repeat his seventeen principles every night in the mosque after *'isha'* prayer after the departure of the people. The scholar from Harat rolled himself in one of the mats in the mosque to listen to al-Dabbās while reciting the principles. When al-Dabbās had only recited seven principles, the Harawī was overcome by a coughing fit, which alerted al-Dabbās to his presence. He beat him up and threw him out. The Harawī returned to his students and recited to them what he heard from al-Dabbās. Abu Sa'id al-Harawī then said that when al-Qāḍī Ḥusayn al-Marrūdhī al-Shāfi'ī (d. 462 / 1069) heard about this story, he reduced the whole Shāfi'ī *madhhab* to four principle, namely the five universal *qawā'id* minus *al-umūr bimaqāṣidihā*. See: Al-Suyūṭī, *al-Ashbāh wal-Nazā'ir*, 7. The translation of the story was borrowed from: Wolfheart Heinrichs, *Qawā'id as a Genre of Legal Literature*, 372.

<sup>68</sup> See: al-Bāḥusayn, *al-Qawā'id*, pp. 312-313.

<sup>69</sup> Ibid., 312.

<sup>70</sup> Wolfheart Heinrichs, *Qawā'id as a Genre*, 372.

<sup>71</sup> Zakariyah, *Application of Legal Maxims*, 42.

strengthen the view of possible fabrication of the story is the existence of the five universal *qawā'id* in their final wordings within this collection. However, *Qawā'id* were still in their early stage, and wordiness was then one of their features; i.e. they were still not articulated in the incisive style associated with *qawā'id*, which demand conciseness. Therefore, al-Karkhī remained the presumed scholar whose treatise is the earliest written collection of *qawā'id*.<sup>73</sup>

### 2.3.2.1. *Al-Uṣūl* by al-Karkhī

The full name for *al-Uṣūl* of al-Karkhī is (*al-Uṣūlu Allatī 'Alayhā Madāru Kutubi Aṣḥābinā*). It is a booklet of around 750 words, containing 38 legal principles relate to the Ḥanafī school.<sup>74</sup> However, there is no clear evidence on whether al-Karkhī formulated them or he just collected them from the early Ḥanafī books.<sup>75</sup> On the other hand, although most of the principles in the booklet are *qawā'id fiqhiyyah*, it also contains a number of *qawā'id uṣūliyyah*. For example, he said, “*al-aṣl annahu yajūz an yakūn awwal al-āyah 'alā al-umūm wa ākhiruhā 'alā al-khuṣūs ka'aksiḥ*” (the fundamental principle is that it is possible that the first portion of a *Qur'ānic* verse may deliver a general ruling, whereas the rest of the verse is for a particular target, and vice versa”. He also said, “*al-aṣl annahu*

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<sup>72</sup> Al-Amiri, *Legal Maxims*, 106.

<sup>73</sup> However, although the story of al-Dabbās has been rejected by many researchers, as pointed out above, it is said that the 17 *qawā'id* of Abu Ṭāhir al-Dabbās are included in *Uṣūl al-Karkhī*, yet it is not known exactly as to which were those 17 maxims in the collection of al-Karkhī. See: al-Zarqā, *al-Madkhal al-Fiqhī*, 2:971. Al-Nadwī, *al-Qawā'id*, 136.

<sup>74</sup> Al-Amiri in *Legal Maxims* mistakenly mentioned that the number of the principles of *Uṣūl al-Karkhī* is 39, whereas the number is 38. See: al-Amiri, *Legal Maxims*, 101.

<sup>75</sup> Al-Nadwī, *al-Qawā'id*, 165.

*yufarraḡ bayna ʿillat al-ḥukm wa-ḥikmatih, faʿinna ʿillatah mūjibah waḥikmatah ḡhayru mūjibah*” (the fundament is that it should be distinguished between the cause of the legal ruling and the wisdom behind it, as the former is effective, whereas the latter is not).

As the pioneering work on *qawāʿid al-fiqh*, some of the principles in *Uṣūl adl-Karkhī* were not coined in the perceptive and eloquent style, which is typically associated to *qawāʿid*. For example, article No. 33 says, “when an event occurs and the jurist does not find a solution for it in the books of our comrades (Ḥanafī books), he should deduce its answer from other sources, either from the *Qurʿān*, the *Sunnah*, or from other sources, considering the strongest first then the less strong”. However, a set of them seems to have undergone reshaping and refinement in the next centuries, although a few of them are still used with slight or no change. For example, the first article in the collection reads, “*al-aṣlu anna mā thabata bi-yaqīnin lā yazulu bi-l-shakk*” (the fundamental principle is that which is established by certainty is not overruled by doubt), which was shortened to be, “*al-yaqīnu lā yazūlu bi-l-shakk*” (certainty is not overruled by doubt), which is the second universal *qāʿidah*. Likewise, article No. 29 says, “*al-aṣlu annahu idhā maḍā bil-l-ijtihādi lā yufsakhu bi-ijtihādin mithlihi wa-yufsakhu bil-naṣṣ*” (the fundamental principle is that what is reached by personal *ijtihād*, it is not cancelled by a similar personal *ijtihād*; it can only be cancelled by a *naṣṣ*). This is very similar to article No. 15 in *Majallat al-Aḥkām al-ʿAdliyyah* which says, “*al-ijtihādu lā yunqaḍu bi-mithlih*” (one legal interpretation does not destroy another).

*Uṣūl al-Karkhī* was published once in the same volume with *al-Uṣūl* of Fakhr al-Islam al-Bazdawī (d. 482 / 1089) in Karachi in Pakistan. It was also published in the same volume with *Taʿsīs al-Nazar* of al-Dabbūsī (d. 430 / 1039) in Cairo, and was edited by Muṣṭafā al-Qabbānī al-Dimashqī. It was also rendered into English along with the commentary by al-Nasafī by Justice Dr. Munir Ahmad Mughal, and published in 1998 in Lahore in Pakistan, but the translation is very poor. Not to forget, finally, that *Uṣūl al-Karkhī* was later on annotated by Najm al-Dīn al-Nasafī (d. 710 / 1310) providing a brief illustration and explanation for each *qāʿidah*.<sup>76</sup>

It is surprising that no book on *qawāʿid* has been reported to be compiled in the following decades of the fourth century, with the exception of two books. The first is *Uṣūl al-Fityā* by Muhammad ibn al-Ḥārith al-Khushanī al-Mālikī (d. 361 / 972), and the second is *Taʿsīs al-Nazāʿir* by Abū al-Layth al-Samarqandī (d. 373 / 984).

### 2.3.2.2. *Uṣūl al-Fityā* by al-Khushanī

*Uṣūl al-Fityā* is considered the pioneering *qawāʿid* work in the Mālikī school, although a large portion of the *qawāʿid* are from the category of *ḍawābiṭ*, i.e. abstractions of the rules of *fiqh* on specific themes and chapters. To give some examples, he said, “*kullu ṣafqatin jamʿat ḥalālan wa-ḥarāman fahya kulluhā ḥarām*” (every bargain which combines lawful and unlawful elements is utterly unlawful”. He also said, “*kull mā ukriha ʿalayh al-insānu mimmā kāna yajibu ʿalayhi an yafʿalahu min ghayri*

<sup>76</sup> Al-Zarqā, *al-Madkhal al-Fiqhī*, 2:971. See also: Laldin, *A Mini Guide*, 100.



*ikrāhin fa-ʿinnahu yujzih*” (whoever is forced to do what is originally compulsory for them to do, they are then legally discharged). The book, besides it being a pioneering *qawāʿid* work, is also an innovative leap forward as a law book compared to the works of the author’s time. It contains collections of legal rulings for certain categories of people in separate chapters. For example, among the chapters he set up were, “chapter of the sick”, “chapter of the child”, “chapter of the woman”, etc. It also contains a collection of the *mashhūr* (well-known) scholastic views within the Mālikī school of law.<sup>77</sup> Notwithstanding, many researchers did not count the book as an exclusive *qawāʿid* work; perhaps because of the multiple purposes, which it was intended to achieve.<sup>78</sup> However, as stated above, no single traditional book was devoted exclusively to the technical known *qawāʿid*, although many of them have this term in their titles, and *Usūl al-Fityā* is not an exception. The book was edited by Muhammad al-Majdhūb, Uthmān Baṭṭikh and Muhammad Abū al-Ajfān and published in Tunis in 1985 by al-Dār al-ʿArabiyyah lil-Kitāb.<sup>79</sup>

### 2.3.2.3. *Taʿsīs al-Nazar* by al-Samarqandī

*Taʿsīs al-Nazar* of al-Samarqandī, on the other hand, contains many *qawāʿid* and *dawābiṭ*, each of which is followed by a number of particulars as applications. Similar to *al-Uṣāl* of al-Karkhī, each *qāʿidah* starts with the word *al-aṣl* (the fundamental principle), which supports that *qawāʿid* were known originally as *uṣūl*. The total number of *uṣūl* is seventy

<sup>77</sup> See: al-Amiri, *Legal Maxims*, pp. 105-106.

<sup>78</sup> Ibid., pp. 105-107.

<sup>79</sup> See: (<http://catalog.library.ksu.edu.sa/digital/345667.html>).

four, discussed in eight chapters. However, the main purpose of the book is to show the differences in view around each *asl* within the Ḥanafī school and between it and other schools. The book is not yet been published, although it was edited as a Masters thesis in al-Azhar university in Cairo by Muhammad Ramaḍān.<sup>80</sup>

No *qawā'id* book has been reported to be compiled in the fifth century except for *Ta'sīs al-Nazar* by Abū Zayd al-Dabbūsī (d. 430 / 1039), nor was any in the sixth century, except for three books; two of which bear the title of *al-Qawā'id* and ascribed to ibn Dust (d. 507 / 1113) and al-Qāḍī 'Iyāḍ (d. 544 / 1149) respectively, while the third bears the title of *Īdāh al-Qawā'id* and is ascribed to 'Alā' al-Dīn al-Samarqandī (d.539 / 1144) without any more valued clarification.<sup>81</sup> In contrast, these three centuries (i.e. the fourth, fifth and sixth) witnessed the compilation of tremendous works on *fiqh* and *uṣūl al-fiqh* in the different schools. This situation raises the question of why did that happen. Although no specific answer has been provided, it should be admitted that lack of reporting and non-availability of the exclusive books on *qawā'id* do not necessarily mean that there was a complete lack of participation in this field. The newness of the compilation on the discipline might be the reason for the lack of popularity and interest, making the supposition of the books being lost a contained probability.<sup>82</sup>

Notwithstanding, many notable jurists of that time wrote books on *fiqh*, but not specific books on *qawā'id*. However, they contributed greatly to the development of the discipline. They formulated new sets of *qawā'id*, and contributed in the editing and refinement of existing ones. For

<sup>80</sup> Al-Bāḥusayn, *al-Qawā'id*, 318. Al-Amīrī, *Legal Maxims*, 103.

<sup>81</sup> See Al-Bāḥusayn, *al-Qawā'id*, pp. 319-321. Al-Nadwī, *al-Qawā'id*, 137.

<sup>82</sup> See: al-Nadwī, *al-Qawā'id*, 137.

example, al-Qāḍī ʿAbdulwahhāb al-Baghdādī al-Malikī (d. 422 / 1031) mentioned and used in his *al-Ishrāf ʿAlā Masāʾil al-Khilāf* (a famous book on comparative law) more than two hundred *qawāʿid*, around half of them are in fully refined form.<sup>83</sup>

*Taʾsīs al-Nazar* of Abū Zayd al-Dabbūsī was, as stated above, the sole book reported to be compiled in the fifth century. It was described as “one of the most valued products of the jurists in the beginning of the fifth century”.<sup>84</sup> Besides it being amongst the pioneering *qawāʿid* works, it is also considered the first work on comparative law, as it deals with the scholastic differences within the Ḥanafī school, and between the Ḥanafī and some of the other schools. The book was published several times in Cairo since 1928. It was edited by Muṣṭafā al-Qubbānī al-Dimashqī in a later publication in Cairo and Beirut.

The book was introduced in nine chapters, each one of them, was dedicated to show the differences in views among scholars in the application of a number of *qawāʿid*. However, more than a quarter of the whole book was dedicated to the differences between the Ḥanafī scholars and al-Shāfiʿī, which reveals that the dispute between Ḥanafīs and Shāfiʿīs, which lasted for centuries, started at an early stage of the *fiqh* development. The chapters are as follows:

1. On the differences between Abū Ḥanīfah and his two close disciples; Abū Yūsuf and Muhammad ibn al-Ḥasan on the other.
2. On the differences between Abū Ḥanīfah and Abū Yūsuf, on the one hand, and Muhammad ibn al-Ḥasan on the other.

<sup>83</sup> Al-Baghdādī, *al-Ishrāf ʿAlā Masāʾil al-Khilāf*, (the introduction of the editor), 141.

<sup>84</sup> Yaʿqūb al-Baḥusayn, *al-Takhrīj ʿInda al-Fuqahāʾ wa al-Uṣūliyyīn*, (Riyadh: Maktabat al-Rushd, 1414 A. H), 112. Al-Nadwī, *al-Qawāʿid*, 166.

3. On the differences between Abū Ḥanīfah and Muhammad ibn al-Ḥasan on the one hand, and Abū Yūsuf on the other.
4. On the differences between Abū Yāsuf and Muhammad ibn al-Ḥasan.
5. On the differences between Muhammad ibn al-Ḥasan and al-Ḥasan ibn Ziyād (d. 204 / 819) on the one hand, and Zufar (d. 158 / 775) on the other.
6. On the differences between the leading Ḥanafī figures on the one hand, and Mālik Ibn Anas on the other.
7. On the differences between Muhammad ibn al-Ḥasan, al-Ḥasan ibn Ziyād and Zufar on the one hand, and ibn Abī Layla (d. 148 / 765) on the other.
8. On the differences between Muhammad ibn al-Ḥasan, al-Ḥasan ibn Ziyād and Zufar on the one hand and al-Shāfiʿī on the other.
9. The ninth chapter was on the differences in the application of some *qawāʿid* among other than the abovementioned scholars, such as Sufyān al-Thawrī (d. 161 / 778), al-Awzāʿī (d. 157 / 774), al-Shaʿbī (d. 109 / 727), etc.

The total number of *qawāʿid* is 86, and all of them start with the word “*al-aṣl*” (the fundamental principle). Each *qāʿidah* was followed by a number of *fiqhī* particulars as application elements, and a statement of the differences among the jurists with regard to each particular.

For example, in the first chapter, which was dedicated to showing the differences between Abū Ḥanīfah and his two disciples (Abū Yūsuf and Muhammad ibn al-Ḥasan), al-Dabbūsī said, “*al-aṣlu ʿinda Abī Ḥanīfata anna kulla man lā yaqdiru binafsihi fawisʿu ghayrihi lā yakunu wisʿan lah*” (the norm according to Abū Ḥanīfah is that any person who is

incapable (to perform the duties) himself, the capability of others is not to replace his capability). Accordingly, the sick person who is incapable to face the *qiblah*, and, subsequently, prayed facing another direction in the presence of another person who did not help him to face the *qiblah*; his prayer is valid. On the contrary, Abū Yūsuf and Muhammad said that the prayer is invalid, because the capability of others can be the capability of the incapable person. In the fifth chapter which was dedicated to the differences between Muhammad ibn al-Ḥasan and al-Ḥasan ibn Ziyād on the one hand and Zufar on the other, al-Dabbūsī said, “*al-aṣlu ‘inda aṣḥābinā anna mālā yatajazza’u fawujūdu ba‘ḍihi kawujūdi kullih, wa‘inda Zufar lā yakūnu wujūdu ba‘ḍihi kawujūdi kullih*” (the fundamental principle according to our comrades is that the existence of a part of an indivisible thing is regarded as the existence of the whole; but according to Zufar the existence of a part of an indivisible thing is not regarded as the existence of the whole). Therefore, if a person enjoined on himself as a vow to pray without making *wuḍū’* (ablution), he is to fulfil the vow and to pray with *wuḍū’*, for prayer and *wuḍū’* are indivisible and a reference to a part of an indivisible thing is regarded as a reference to the whole. Zufar, on the contrary viewed that he is not to fulfil the vow since prayer without *wuḍū’* is invalid.

Although *qawā‘id fiqhiyyah* occupy the bigger share of the book, al-Dabbāsī did mention some *qawā‘id uṣūliyyah*. For example, in the sixth chapter which is on the differences between the Ḥanafī scholars and imam Mālik, al-Dabbūsī said, “*al-aṣlu ‘inda ‘ulamā’inā al-thalāthati anna al-khabara al-marwiya ‘an rasūli-llāhi ṣallā Allāhu ‘alayhi wasallama min*

*ṭarīqin al-āḥādī muqaddamun ‘alā al-qiyāsi al-ṣaḥīḥi, wa‘inda Mālikin – radiya-llāhu ‘anhu - al-qiyāsu al-ṣaḥīḥu muqaddamun ‘alā khabari al-āḥād’* (the fundamental principle according to our three jurists is that the solitary report, which is narrated from the Prophet (PBUH) has priority over the correct analogy, but according to Mālik the correct analogy has priority over the solitary report). Similarly, in the eighth chapter, which discusses the differences between the Ḥanafī jurists and al-Shāfi‘ī, he said, “*al-aṣlu ‘inda aṣḥābinā anna qawla al-ṣaḥābiyyi muqaddamun ‘alā al-qiyāsi idhā lam yukhālīfhu aḥadun min nuṣarā’ihī, li’annahu lā yajūzu an yuqala innahu qālahu juzāfan, fal-ẓāhiru annahu qālahu samā’an min rasūli-llāhi ṣallā Allāhu ‘alayhi wasallama. Wa ‘inda al-imāmi al-Qurashiyyi Abī ‘Abdillāhi ash-shāfi‘iyyi al-qiyāsu muqaddamun, li’annahu lā yarā bitaqlīdi al-ṣaḥābiyyi lā al-akhdha bira’iyihī*” (The fundamental principle according to our comrades is that the opinion of a companion of the Prophet (PBUH) has priority over (analogy), provided that no other companion of the Prophet disagreed with him, as it cannot be said that the companion talks haphazardly; instead, it is most likely that he heard it from the Prophet (PBUH). Al-Shāfi‘ī, in contrast, viewed that analogy has priority, since he did not adopt imitating the companions of the Prophet as a source).

### 2.3.3. *Qawā'id* From the Seventh / Thirteenth to the End of the Tenth / Sixteenth Centuries.

#### 2.3.3.1. *Qawā'id* in the Seventh / Thirteenth Century.

By the beginning of the seventh century, the discipline of *qawā'id al-fiqh* started to be crystallized as a trenchant and distinct science. However, once again, not many books were reported to have been compiled in the seventh century.

Abū Ḥāmid al-Jāʾirmī al-Shāfiʿī (d. 613 / 1216) wrote a book titled “*al-Qawā'id Fī Furū' al-Shāfi'iyyah*”, which was thought to be a new writing style on *qawā'id* and a step forward. Ibn Khallakān (d. 681 / 1282) in his *Wafāyāt al-A'yān* when mentioned the biography of al-Jāʾirmī said that students knuckled down studying his works, especially his book on *qawā'id*. Unfortunately, the book is lost, so no further clear information on it is available.<sup>85</sup>

*Qawā'id al-Aḥkām Fī Maṣāliḥ al-Anām* by ʿIzz al-Dīn ibn ʿAbd al-Salām (d. 660 / 1262), on the other hand, has been highly acclaimed as a distinct contribution to the discipline of *qawā'id*.<sup>86</sup> However, the book is intended to be a work on *maqāṣid al-sharīʿah*, and addresses the various aspects of the *maqāṣid*, rather than a *qawā'id* book, as the author himself mentioned in the introduction of the book.<sup>87</sup> Nevertheless, a number of *qawā'id fiqhiyyah* were also used, although the flavour of *maqāṣid* is still there in many of them. For example, he said, “*lā yataṣarrafu fī amwālī al-*

<sup>85</sup> Al-Bāḥusayn, *al-Qawā'id*, pp. 322-323.

<sup>86</sup> Kamali, *Sharīʿah Law*, 153.

<sup>87</sup> ʿIzz al-Dīn ibn ʿAbd al-Salām, *Qawā'id al-Aḥkām*, First Edition, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1992), 1:11

*maṣālihi al-‘āmmati illā al-a‘immatu aw nuwwābuhum*”<sup>88</sup>(no one is entitled to dispose of public funds except for the imams or their deputies). He also said, “*taqdīru al-naḥqāti bil-ḥajāti ‘alā tafāwutihā ‘adlun wataswiyah*”<sup>89</sup> (providing maintenance based on needs is just and equitable, even if it is variable). On another occasion he said, “*lā taṣiḥḥu al-niyābatu fī shay‘in mina al-‘ibādāt*”<sup>90</sup> (substitution is not valid in the ritual acts). It is worth mentioning that the book is known also as ‘*al-Qawā‘id al-kubrā*’ (the Grand *Qawā‘id*), distinguishing it from the author’s other book, titled ‘*al-Fawā‘id Fī Ikhtisār al-Maqāṣid*’, which is known as ‘*al-Qawā‘id al-Ṣuḡhrā*’ (the Lesser *Qawā‘id*).

Muhammad al-Bakrī al-Qafṣī (d. 685 / 1286) is a Mālikī scholar who wrote a book on *qawā‘id* belong to the Mālikī school of law entitled ‘*al-Mudhhab Fī Dabṭi Qawā‘id al-Madhhab*’. The book is lost, but ibn Farḥūn in *al-Dhibāj al-Mudhhab* described the work done in this book as *ḥasan* (good).

### 2.3.3.2 *Qawā‘id* Works in the Eighth / Fourteenth Century.

The fourth / tenth century witnessed the compilation of the first *qawā‘id* collection, i.e. *Uṣūl al-Karkhī*. Works on the discipline started to follow after that, but if we consider only the books, which were reported to have been compiled (both those which have survived and those which have not), there were long intervals between them. As such, only around ten books have been compiled in four centuries. At first glance, the discipline

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<sup>88</sup> Ibid., 1:58.

<sup>89</sup> Ibid., 1:51.

<sup>90</sup> Ibid. 2:113.



seems to have lost momentum early; yet, as pointed out above, the lack of reporting and the non-availability of the books does not necessarily mean that there was actual lack of participation. Furthermore, the loss of the books was, for a number of reasons, a phenomenon at that time even with regard to the works of famous figures. For example, al-Shāfiʿī has been reported of having written many books in different branches of knowledge, yet those available can be counted on the fingers of one hand.<sup>91</sup> Taking this into consideration, and also the newness of *qawāʿid* as a distinct discipline, which had not yet gained popularity, the assumption of the loss of *qawāʿid* works seems to be a strong possibility. Furthermore, the well-organised works, which were compiled in the subsequent centuries signified that they were preceded by less organised ones, regardless whether they are available or lost, as is usual in the early steps of any discipline. One can refer, in supporting this, to the history of development of other disciplines, such as *uṣūl al-fiqh*, *al-fiqh*, *al-tafsīr*, *muṣṭalah al-ḥadīth*, etc.

Having said this, a marked resurgence of interest in *qawāʿid* is noted from the beginning of the eighth / fourteenth century onward, which was reflected in the jurists' efforts to deduce general rules by way of induction from the legal manuals of the *madhāhib*.<sup>92</sup> Unlike the situations in the previous centuries in which works of *qawāʿid* appeared sporadically (on the assumption that there was really a lack of participation with regard to the compilation on *qawāʿid*), the discipline in this era developed steadily.<sup>93</sup> The phrase *al-ashbāh wal-naẓāʾir* emerged as a catch-all for *qawāʿid* and other

<sup>91</sup> Muḥammad ibn Idrīs al-Shāfiʿī, *al-Risālah*, ed. Ahmad Muhammad Shākir, (Beirut: Dār al-Kutub al-ʿIlmiyyah, nd), the introduction of the editor, 9.

<sup>92</sup> Al-Nadwī, *al-Qawāʿid*, 138. Al-Bāḥusayn, *al-Qawāʿid*, 324.

<sup>93</sup> Al-Amiri, *Legal Maxims*, 121.

related subjects, and was used widely as such in the titles of many books.<sup>94</sup> However, the term (*al-qawā'id*) was also prevalent, and used in the titles of many other books, such as *al-Qawā'id* of al-Maqqarī al-Mālikī (d. 758 / 1357), *al-Manthūr Fīl-Qawā'id* by al-Zarkashī and *al-Qawā'id* by ibn Rajab al-Ḥanbalī (d. 795 / 1393).<sup>95</sup>

The eighth / fourteenth century, according to many, was the golden age of the development of *ʿilm al-qawā'id al-fiqhiyyah*.<sup>96</sup> It witnessed the compilation of many works upon which most of the books, which were compiled later depended in one way or another. Moreover, it is after this point that *al-qawā'id al-fiqhiyyah* started to be distinguished clearly from other types of *qawā'id*, such as *al-qawā'id al-uṣūliyyah*, the linguistic rules, and others, although in some collections there still remained a kind of mixture between the different *qawā'id* types. In addition, various approaches were adopted in presenting the subject and with regard to the categorisation of the *qawā'id*, as will be elaborated later on. The following is a list of the most important works in this century, followed by detailed analytical comment on the most significant.

1. *Al-Ashbāh wal-Nazā'ir* by Ṣadr al-Dīn bn al-Wakīl (d. 716 / 1316) (Shāf'ī).
2. *Al-Qawā'id al-Kubrā* by Najm al-Dīn al-Ṭūfī (d. 716 / 1316) (Ḥanbalī).
3. *Al-Qawā'id al-Nūrūniyyah al-Fiqhiyyah* by Taqiy al-Dīn ibn Taymiyyah (d. 728 / 1328) (Ḥanbalī).
4. *Al-Mudhhib fī Zabṭ Qawā'id al-Madhhab* by al-Bakrī al-Qafṣī (d. 736 / 1336) (Mālikī).

<sup>94</sup> Al-Bāḥusayn, *al-Qawā'id*, 324.

<sup>95</sup> Zakariya, *Application of Legal Maxims*, 44.

<sup>96</sup> Al-Nadwī, *al-Qawā'id*, 138. Al-Bāḥusayn, *al-Qawā'id al-Fiqhiyyah*, 324.

5. *Al-Qawā'id* by al-Maqqarī (d. 758 / 1357) (Mālikī).
6. *Al-Majmū' al-Mudhhib fī Qawā'id al-Madhhab* by Ṣalāḥ al-Dīn al-ʿAlā'ī (d. 761 / 1360) (Shāfiʿī).
7. *Al-Qawā'id al-Fiqhiyyah* by ibn Qāḍī al-Jabal (d. 771 / 1370) (Ḥanbalī).
8. *Al-Ashbāḥ wal-Nazā'ir* by Tāj al-Dīn al-Subkī (d. 771 / 1370) (Shāfiʿī).
9. *Al-Ashbāḥ wal-Nazā'ir* by Jamāl al-Dīn al-Isnawī (d. 772 / 1371) (Shāfiʿī).
10. *Al-Manthūr fīl-Qawā'id* by Muhammad ibn Bahādir al-Zarkashī (Shāfiʿī).
11. *Taqrīr al-Qawā'id wa-Taḥrīr al-Fawā'id* by ibn Rajab al-Ḥanbalī (Ḥanbalī).
12. *Al-Qawā'id Fīl-Furū'* by Sharaf al-Dīn al-Ghazzī (d. 799 / 1397) (Ḥanafī).

The approaches which have been followed in presenting the *qawā'id* vary from one book to another. However, they were mainly three approaches: first, arranging the *qawā'id* and *ḍawābiṭ* in the same order of topics as found in *fiqh* works; second, arranging them according to their comprehensiveness and scope of application; and third, arranging them alphabetically. The first group includes works such as *al-Qawā'id* by al-Maqqarī and *Taqrīr al-Qawā'id wa-Taḥrīr al-Fawā'id* by ibn Rajab al-Ḥanbalī. The second group includes *al-Majmū' al-Mudhhib fī Qawā'id al-Madhhab* by al-ʿAlā'ī and *al-Ashbāḥ wal-Nazā'ir* by Tāj al-Dīn al-Subkī. *Al-Manthūr fīl-Qawā'id* by al-Zarkashī represents the third approach.<sup>97</sup>

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<sup>97</sup> Al-Bāḥusayn, *al-Qawā'id*, 336.

Although the Ḥanafīs were pioneers in collecting *qawā'id* in separate books and treatises, their contribution in the eighth / fourteenth century in this regard was very limited. Out of the many books, only one has been ascribed to a Ḥanafī scholar; namely, *al-Qawā'id Fīl-Furū'* by Sharaf al-Dīn al-Ghazzī (No. 12 in the list). However, ibn Ḥajar al-ʿAsqalānī (d. 852 / 1448) in *al-Durar al-Kāminah* and Al-Ziriklī in *al-A'ālām* counted al-Ghazzī amongst the Shāfiʿī scholars, lowering the contribution of the Ḥanafīs almost to zero.<sup>98</sup> On the contrary, the Shāfiʿīs' contribution was at the peak, for, as is shown in the list, most of the significant works were by Shāfiʿī scholars.<sup>99</sup> The contribution of the Mālikī and Ḥanbalī scholars was there, although they did not reach the level of the Shāfiʿīs. This disparity in the number of books compiled in this era may reflect different levels of consideration between the schools of law at different points in history concerning the importance of *qawā'id* in the field of *fiqh*. On the other hand, some of the above listed books, which have the term *qawā'id* in their titles, were not pure *qawā'id* works. Rather, they are *fiqh* works, which contain significant sets of *qawā'id* as controllers of the particulars of the different chapters. The clear example in this respect is *al-Qawā'id al-Nūrāniyyah* of ibn Taymiyyah (No. 3 in the list), which was arranged in the same order as a work of *fiqh* and contained, besides *qawā'id*, other elements, such as definitions, conditions, classifications, etc., in addition to

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<sup>98</sup> Ibn Ḥajar al-ʿAsqalānī, *al-Durar al-Kāminah*, (Haidarabad: Majlis Dār al-Maʿārif al-ʿUthmāniyyah, 1972), 4:241. Khayruddīn al-Zirkalī, *al-A'ālām*, Fifth Edition, (Beirut: Dār al-ʿIlm Lil-Malāyīn, 1980), 5:105.

<sup>99</sup> Al-Nadwī, *al-Qawā'id*, 138.

the clear involvement to *al-fiqh al-muqāran* (comparative law) which does not seem to be closer to the methodology followed in writing on *qawā'id*.<sup>100</sup>

#### 2.3.3.2.1. *Al-Ashbāh wal-Nazā'ir* by Ibn al-Wakīl.

*Al-Ashbāh wal-Nazā'ir* by Ṣadr al-Dīn ibn al-Wakīl (No. 1 in the list above), a Shāfi'ī scholar known also as ibn al-Muraḥḥal, was the first book which ever bore the title of *al-Ashbāh wal-Nazā'ir*; the term which signifies the analogical nature of *qawā'id* and similar subjects. The book was described as unprecedented and unique, for the author established it on his own inductive reasoning based on the Shāfi'ī manuals, and he deduced many *qawā'id* out of similar issues, which share common legal ideas. It was the focus of many following works within the Shāfi'ī school of law, by editing its content, adding relevant topics or removing irrelevant issues.<sup>101</sup>

However, ibn al-Wakīl died before he could present his book in the final version.<sup>102</sup> Therefore, the book comes without an introduction to reveal his aims and methodology. Moreover, the contents and chapters were introduced in a disorganised way without any clear relevance to each other. In many cases, the headings are confusing, as he used the terms of *qawā'id*, *fuṣūl* (chapters) and *fawā'id* (anecdotes) interchangeably.<sup>103</sup> However, his nephew Zayn al-Dīn (d. 742 / 1338) carried out the task of arranging the contents and added his own comments.<sup>104</sup> On the other hand, being titled *al-Ashbāh wal-Nazā'ir* signifies that it was not meant to be for *qawā'id fihiyyah* exclusively, as the term applies to all legal principles, which

<sup>100</sup> See: al-Bāḥusayn, *al-Qawā'id*, 327.

<sup>101</sup> Al-Bāḥusayn, *al-Qawā'id*, pp. 324-325. Al-Amiri, *Legal Maxims*, 121.

<sup>102</sup> Al-Amiri, *Legal Maxims*, 121.

<sup>103</sup> Al-Bāḥusayn, *al-Qawā'id*, 326.

<sup>104</sup> Ibid., 122.

share an idea in common. As such, it would not be strange to find significant evidence of *qawā'id uṣūliyyah* in the book, although the use of the term in the later stages, excluded *al-qawā'id al-uṣūliyyah* from its scope. The book was edited as Masters theses by two students in Riyadh in Saudi Arabia in 1984 and published later on in 1993.<sup>105</sup>

#### 2.3.3.2.2. *Al-Qawā'id* by al-Maqqarī.

*Al-Qawā'id* by al-Maqqarī (No. 5 in the list), a famous Mālikī scholar, was one of the more significant *qawā'id* works in the eighth century. It contains 1200 *qā'idah*, intended to encompass the particulars of most of the main chapters and issues within the Mālikī school of law. They are, in general, of two categories, namely the already existent *qawā'id* in the *fiqh* manuals and new coined *qawā'id*. For the former, al-Maqqarī collected them from the books of *fiqh*, although he edited and reshaped some of them, whereas for the latter category, he invented them based on the inductive reasoning and *ijtihād*.<sup>106</sup> Aḥmad Bin Ḥumayd edited two volumes of the book, which include only 400 *qawā'id*, and submitted them to *Umm al-Qurā* university in Makkah for his PhD degree.

The larger portion of the *qawā'id* in al-Maqqarī's book fall into the *dawābiṭ* category: i.e. the *qawā'id* whose particulars belong to one chapter or legal theme. This is because he arranged the book in the same order as the works of *fiqh* (starting from the chapters of purity, prayer, fasting, *zakāh*, etc).<sup>107</sup> In another respect, perhaps due to the large number of

<sup>105</sup> Al-Bāḥusayn, *al-Qawā'id*, 326. See also: (<http://www.mmf-4.com/vb/t3079.html>).

<sup>106</sup> See the introduction of *al-Qawā'id* of al-Maqqarī by the editor Aḥmad bin Ḥumayd, 1:166, 1:174. Al-Bāḥusayn, *al-Qawā'id*, 328.

<sup>107</sup> Ibid.

*qawā'id* included in the book and the fear that it may become even larger, al-Maqqarī usually mentions few examples from the *fiqh* particulars as applications of the *qawā'id*.<sup>108</sup> In many occasions, he did not mention a single example to elaborate the *qawā'id*, as in the case of the *qawā'id* 69, 70, 103, and 123. In addition, some of the *qawā'id* are presented in an interrogative style, reflecting the disagreement amongst the Mālikī scholars over their contents. The *qawā'id* 19, 26, 95, 105, 207, 323 and 325 are examples of the controversial *qawā'id* within the Mālikī school of law. Moreover, although the book deals specifically with the *qawā'id* from the Mālikī school, he frequently mentions the views of other schools, especially those of the Ḥanafī and the Shāfi'ī schools.<sup>109</sup>

However, although the book is one of the best works contributing much to legal literature in general and to Mālikī *fiqh* in particular, it was not a pure *qawā'id* work, as it contains a mixture of *qawā'id* and other things. Al-Maqqarī was apparently aware of this matter, because he mentioned at the end of the book that he added some significant issues not related to *qawā'id*.<sup>110</sup> In this sense, he should have not called them *qawā'id*, or, at least, should have grouped them in exclusive categories. On many occasions, what he considers a *qā'idah* is merely a definition or the like.<sup>111</sup> For example, he said, “*qā'idah: al-ḥayḍu al-damu al-kharīju bi-nafsihi min farji al-mumkini ḥamluhā 'ādatan*” (a maxim: menstruation is the blood which oozes through the vagina of a female who is in the age of

<sup>108</sup> The introduction of *al-Qawā'id* of al-Maqqarī by the editor Aḥmad bin Ḥumayd, 1:152.

<sup>109</sup> Al-Amiri, *Legal Maxims*, 139.

<sup>110</sup> Ibid., 137.

<sup>111</sup> The introduction of *al-Qawā'id* of al-Maqqarī by the editor Aḥmad bin Ḥumayd, 1:179.

pregnancy).<sup>112</sup> On another occasion he said, “*qāʿidah: yuṭlaqu al-wājibu ʿalā al-sunnati al-muʿakkadati majāzan*” (a maxim: the highly recommended actions can be called metaphorically as *wājib*, i.e. compulsory).<sup>113</sup> Furthermore, some of what he mentions as *qawāʿid* are just legal particulars. For example, he said, “*al-kalāmu ʿinda Mālikin wa-ʿinda Muḥammadin maḥzūrun mina al-ṣalāt*” (speech, according to Mālik and Muhammad, i.e. al-Shāfiʿī, is prohibited while one is praying).<sup>114</sup> In other ways, some of the *qawāʿid* are pieces of advice to his students and the readers of his book. For example, he advised the students in *qāʿidah* 224 not to exaggerate in finding out the legal rulings for unreal situations and questions, and to involve themselves in memorising the *nuṣūṣ* from the *Qurʾān* and the *Sunnah* rather than involving themselves in tracing the views of the jurists.<sup>115</sup>

### 2.3.3.2.3. *Al-Ashbāh wal-Nazāʿir* by Ibn al-Subkī.

*Al-Ashbāh wal-Nazāʿir* by Tāj al-Dīn ibn al-Subkī (No. 8 in the list above) is seen by many to be the most systematic *qawāʿid* work of the eighth century.<sup>116</sup> The term (*al-ashbāh wal-nazāʿir*), generally speaking, is an inclusive legal term which encompasses many law-related subjects, among which indeed are *al-qawāʿid al-fiqhiyyah*. Al-Subkī in this work discussed *qawāʿid* in an organised manner. He divided the book into eight chapters, where three of them, occupying half the book, are for *qawāʿid* in

<sup>112</sup> Al-Maqqarī, *al-Qawāʿid*, 1:340.

<sup>113</sup> Ibid., 2:388.

<sup>114</sup> Ibid., 2:378.

<sup>115</sup> Ibid., 2:467.

<sup>116</sup> Al-Bāḥusayn, *al-Qawāʿid*, 331.



different classifications.<sup>117</sup> In the first chapter, he discussed the five universal *qawā'id*; in the second, he discussed 28 *qawā'id* that he described as *al-qawā'id al-ʿāmmah*, meaning the general maxims (which is another name for the *qawā'id kulliyyah*, the focus of the fourth chapter of this thesis); in the third, his discussion was on *al-qawā'id al-khāṣṣah*, i.e. the special maxims (which is another name for the *ḍawābiṭ* or legal controllers), where he introduced, discussed and elaborated about 185 *ḍawābiṭ*. The rest of the chapters were on other legal and linguistic principles, which have, in one way or another, impacted on the process of extracting the legal particulars.<sup>118</sup> The book was edited by ʿĀdil ʿAbd al-Mawjūd and ʿAli Muʿawwaḍ and published by Dār al-Kutub al-ʿIlmiyyah in Beirut in 1991.

The main purpose of writing this book, al-Subkī says, was to edit the abovementioned *al-Ashbāh wal-Naẓā'ir* of ibn al-Wakīl. In the introduction, he mentioned that the motive behind the compilation of his book was that he found *al-Ashbāh wal-Naẓā'ir* of ibn al-Wakīl in need of editing, as the latter died before he could introduce it in its final version. He said that he sought permission from his own father, Taqiyy al-Dīn al-Subkī (d. 756 / 1355), who was also a famous Shāfiʿī scholar, to do this task upon the start of writing the book, and that the father permitted him to do so. He then said that he completed the task in a perfect manner, and that he omitted from the book irrelevant subjects, and added some missed related ones, which he described as possessing unique and countless virtues, which

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<sup>117</sup> Ādam Al-Quḍah & Usāmah al-Rabābʿah, 'Manhaj al-Imām al-Subkī fī Kitāb al-Ashbāh wal-Naẓā'ir', in: *Majallat Jāmiʿat Dimashq lil-ʿUlūm al-Iqtisādiyyah wal-Qānūniyyah* (Journal of the University of Damascus for economic and legal sciences), Vol. 24, No. 2, 2008, 408.

<sup>118</sup> Al-Subkī, *al-Ashbāh wal-Naẓā'ir*, 3.

increased the size of the book with an amount equal to more than a half of its original size.<sup>119</sup> However, al-Subkī was the first scholar who provided a technical definition for *al-qawā'id al-fiqhiyyah*, when he said, “a comprehensively valid rule which applies to many particulars, so that their legal determinations can be comprehended from it”. He also differentiated between the *qā'idah* and the *dābiṭ*, allocating the former in the category of the legal principle whose particulars are from different *fiqh* chapters; the latter is for the principle which encompasses particulars from one chapter or legal theme.<sup>120</sup>

Al-Subkī's methodology varies with regard to the discussion of the different categories of *qawā'id*. For the five universal maxims, he criticized the views that the whole of *fiqh* can be reduced to these *qawā'id*, saying that this cannot be done without much *ta'assuf wa takalluf* (contortion and artificiality); instead he insisted that the number of *qawā'id* to encompass the whole *fiqh* is more than fifty and may even reach two hundred.<sup>121</sup> However, he dedicated a whole chapter to discuss and present them and their subsidiaries exclusively. His discussion of every *qā'idah* includes analysing and explaining its wordings, giving examples for both the particulars included and those exempt from its application, mentioning the subsidiary *qawā'id* and stating the legal researches which relate to its subject. He seldom mentions the origins of the *qā'idah* from either the *Qur'ān* or the *Sunnah*, and rarely states the views of the other *madhāhib*

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<sup>119</sup> Ibid., pp. 16-17.

<sup>120</sup> Ibid., 21.

<sup>121</sup> Ibid., 22.

rather than the Shāfiʿī school.<sup>122</sup> As for the *qawāʿid kullīyyah*, al-Subkī applied the same methodology that he had followed in the first chapter yet with less elaboration. He, unlike in the first chapter, did mention in detail some disputed issues between the different schools on the one hand, and the Shāfiʿī school on the other. For example, he defended the approach of the Shāfiʿī school in not considering *sadd al-dharāʾiʿ* (blocking the means) as one of the sources of law, when he mentions that the *qāʿidah* relates to this subject (which is amongst the group of principles considered as *qawāʿid uṣūliyyah* and *fiqhiyyah* at the same time). He denounced the Mālikī approach in this regard, and mentioned the argumentation of the Shāfiʿī school when defending their stand. He replied to some of the Mālikīs’ reasoning, producing proofs to support their position.<sup>123</sup> With regard to the third chapter, al-Subkī divided it into quarters; namely the quarter of *al-ʿibādāt* (devotional rituals), the quarter of *al-bayʿ* (sale), the quarter of *al-munākaḥāt* (marriages) and the quarter of *al-qaḍāʾ wal-bayyināt* (judiciary and evidence). He mentioned the *dawābiṭ* of the chapters of each quarter in the same methodology he followed in the previous chapters in terms of explaining every *dābiṭ*, giving examples of the included and exempted particulars, etc. However, not all the principles he mentioned in this chapter are from the *dawābiṭ* category, as there are some more comprehensive ones, which he did not mention in the previous chapter because, according to him, they do not have the scope of application as that of the *kullīyyāt*.<sup>124</sup> For example, he said, “*qāʿidah: kullu ḥurrin yuqbalu khabaruh tuqbalu shahādatuh*” (a maxim: every free person whose

<sup>122</sup> Al-Qudāh & al-Rabābʿah, *Manhaj al-Imām al-Subkī*, 411.

<sup>123</sup> See: Al-Subkī, *al-Ashbāh*, pp. 119-123.

<sup>124</sup> Al-Qudāh & al-Rabābʿah, *Manhaj al-Imām al-Subkī*, 415.

reporting is accepted, their testimony is also accepted)<sup>125</sup>, which is a principle with particulars from more than one chapter.

### 2.3.3.3. *Qawā'id* Works in the Ninth / Fifteenth Century.

According to some researchers, the ninth / fifteenth century did not witness real ingenuity in the field of *al-qawā'id al-fiqhiyyah*. Most of what was written was merely rewriting or editing of books written in the previous century; very few of them have been seen as significant, although they added some other examples to illustrate the *qawā'id*.<sup>126</sup> No reason has been provided to explain the lack of creativity in this century. The striking matter, however, is that this was the situation in all of the schools of law, unlike the situation of the eighth century when only the Ḥanafīs were absent from the scene.

The following is a list of the books reported to be compiled in the ninth century, some of which are available and others lost. A brief commentary will be given on some of them.

1. *Al-Ashbāh wal-Naẓā'ir* by ibn al-Mulaqqin (d. 804 / 1401), a Shāfi'ī scholar. The book is arranged in the same order as the *fiqhī* books, and it is said that the author, ibn al-Mulaqqin, revised and edited it three times in forty years. The main sources of the book were *al-Ashbāh wal-Naẓā'ir* of ibn al-Wakīl, *al-Majmū'u al-Mudhhib* of Ṣalāḥ al-Dīn al-ʿAlā'ī and *al-Ashbāh wal-Naẓā'ir* of al-Subkī, all of which are from the eighth century

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<sup>125</sup> Al-Subkī, *al-Ashbāh*, 444.

<sup>126</sup> See: al-Bāḥusayn, *al-Qawā'id*, 336. Al-Nadwī, *al-Qawā'id*, 140. Al-Amīrī, *Legal Maxims*, 144.

works.<sup>127</sup> The book has been recently edited by Muṣṭafā al-Azhārī and published in Riyadh by Dār ibn al-Qayyim in 2010.

2. *Asnā al-Maqāṣid fī Tahrīr al-Qawā'id* by Muhammad ibn al-Khuḍarī al-Zubayrī al-Shāfi'ī (d. 808 / 1405).

3. *Al-Qawā'id* by Taqiyy al-Dīn al-Ḥiṣnī al-Shāfi'ī (d. 829 / 1426). This book, although it is a *qawā'id fiqhiyyah* work, contains many *qawā'id uṣūliyyah*. The influence of *al-Majmū'u al-Mudhhib* of al-'Alā'ī is very clear in terms of arrangement and manner of presentation. The book has been edited by Abd al-Rahmān al-Sha'lān and published in Riyadh by Maktabat al-Rushd in 1997.

4. *Mukhtaṣar min Qawā'id al-'Alā'ī wa-Tamhīd al-Asnawī* by ibn Khaṭīb al-Dahshah (d. 834 / 1431). The book is a summary of two books; *al-Majmū'u al-Mudhhib* of al-'Alā'ī and *al-Tamhīd fī Takhrīj al-Furū'ī 'ala al-Uṣūl* by al-Asnawī, and arranged in the same order of the *fiqh* books.

5. *Ḥawāshī al-Qawā'id al-Fiqhiyyah* by ibn Naṣrullah al-Ḥanbalī (d.844 / 1441).

6. *Naẓm al-Dakhā'ir fīl-Ashbāh wal-Naẓā'ir* by Sharaf al-Dīn al-Khalīlī al-Maqdisī al-Shāfi'ī (d. 876 / 1473).

7. *Al-Mudhhib fī Dabṭi Qawā'id al-Madhhab* by 'Azzūm al-Mālikī (d. 889 / 1484).<sup>128</sup>

It is obvious that the contribution of the Shāfi'īs to the field continued to be much more than the contribution of the other schools, and that the Ḥanafīs were still absent. In this context, al-Nadwī in his *al-*

<sup>127</sup> Al-Bāḥsayn, *al-Qawā'id*, pp. 336-337. Al-Nadwī, *al-Qawā'id*, 139.

<sup>128</sup> See for more information about these books: al-Bāḥsayn, *al-Qawā'id*, pp. 336-341.

*Qawā'id*, when mentioning the works of the ninth century, counted the book entitled *Al-Qawā'id wal-Dawābiṭ* by ibn ʿAbd al-Hādī al-Ḥanbalī as a *qawā'id fiqhiyyah* work.<sup>129</sup> The fact is that ibn ʿAbd al-Hādī died in 909 / 1503 and not in 880 / 1475 as al-Nadwī mentioned; so he belonged to the scholars of the tenth century. On the other hand, the book is arranged in the typical *fiqh* arrangement, and its content comprises definitions and classifications of the *fiqh* subjects and themes. Perhaps al-Nadwī read only the introduction where the author mentioned that the book is a set of *qawā'id* and *dawābiṭ* intended to be a useful reference to the students to control the (*fiqh*) matters.<sup>130</sup> To give some examples, the fifth *qā'idah* was about the pillars of the ablution. He said,

“The fifth is on the pillars of ablution. They are six, 1. washing the face, 2. washing the two hands up to the elbows, 3. wiping the head, 4. washing the two feet, 5. doing the actions of ablution in the mentioned order, and 6. doing one action of ablution immediately after the other”.<sup>131</sup>

The twenty sixth *qā'idah* is on the types of wealth, which *zakah* is taken from. He said,

“the twenty sixth is on the types of wealth from which *zakah* is to be taken. They are four: 1. grazing livestock (which are of three types) 2. what comes out from the ground (i.e. cereals and crop harvest), 3. gold and silver, and 4. merchandise for immediate trade”.<sup>132</sup>

<sup>129</sup> Al-Nadwī, *al-Qawā'id*, 140.

<sup>130</sup> Jamāluddīn Ibn ʿAbd al-Hādī, *al-Qawā'id al-Kulliyyah wa al-Dawābiṭ al-Fiqhiyyah*, ed. Jāsim al-Dūsarī, First Edition, (Beirut, Dār al-Bashā'ir al-Islāmiyyah, 1994), 43.

<sup>131</sup> Ibid., 48.

<sup>132</sup> Ibid., 62.

#### 2.3.3.4. *Qawā'id* Works in the Tenth / Sixteenth Century.

For many writers, the tenth century represented the beginning of the mature stage in the science of *al-qawā'id al-fiqhiyyah*: it witnessed the compilation of respected books on the discipline in most of the schools, which enjoyed a more enhanced reputation than the works of the earlier centuries.<sup>133</sup> This can be noted from the abundant quotations from these books in the writings of later jurists.<sup>134</sup> On the other hand, the distinction between *al-qawā'id al-fiqhiyyah* and *al-qawā'id al-uṣūliyyah* is notably clear in these books, as they do not contain the latter sort of legal principles mixed with the former, except when the *qā'idah* is seen to have dual roles.

The other important event which took place in this century is the renaissance of interest on *qawā'id* within the Ḥanafī school in this field, although it provided only one (available) book; namely (*al-Ashbāh wal-Naẓā'ir*) by ibn Nujaym al-Miṣrī (d. 970 / 1562), which was arranged in a well-organized manner and has been the focus of many subsequent Ḥanafī books. However, it seems as if it was an exchange of roles; for the Ḥanbalīs works disappeared, as no work by any Ḥanbalī scholar has been reported to be compiled in this century. *Al-Qawā'id wal-Dawābiṭ* by ibn ʿAbd al-Hādī al-Ḥanbalī, as explained earlier, is not a *qawā'id* work in the first place. On the other hand, while the Shāfiʿīs had written more books than the other schools in the previous times, the Mālikīs appear more active in this century, and their works varied between normal books and versified treatises.

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<sup>133</sup> Al-Nadwī, *al-Qawā'id*, 140, al-Bāḥusayn; *al-Qawā'id*, 341; Al-Amiri, *Legal Maxims*, 144.

<sup>134</sup> Al-Amiri, *Legal Maxims*, 144.

The following are the most of the known works written during this century, followed by analytical comments on the most significant.

1. *Al-Ashbāh wal-Nazāʿir* by Jalūduddīn al-Suyūṭī (Shāfiʿī) (d. 911 / 1505).
2. *Manzūmat al-Manhaj al-Muntakhab* by Abū al-Ḥasan al-Zaqqāq (Mālikī) (d. 912 / 1506).
3. *Īdah al-Masālik ilā Qawāʿid al-Imām Mālik* by Abū al-ʿAbbās al-Wansharīsī (Mālikī) (d. 914 / 1508).
4. *Al-Kulliyyāt al-Fihiyyah* by ibn Ghāzī (Mālikī) (d. 919 / 1512).
5. *Sharḥ al-Manhaj al-Muntakhab* by Abū al-ʿAbbās al-Zaqqāq (Mālikī) (d. 931 / 1524).
6. *Sharḥ Qawāʿid al-Zarkashī* by Sirāj al-Dīn al-ʿAbbādī (Shāfiʿī) (d. 947 / 1540).
7. *Al-Nūr al-Muqtabas fī Qawāʿid Mālik ibn Anas* by ʿAbd al-Wāḥid al-Wansharīsī (Malikī) (d. 955 / 1548).
8. *Al-Ashbāh wal-Nazāʿir* by ibn Nuḡaym al-Miṣrī (Ḥanafī).
9. *Al-Maqāṣid al-Saniyyah wal-Qawāʿid al-Sharʿiyyah* by ʿAbd al-Waḥḥāb al-Shaʿrānī (Shāfiʿī) (d. 973 / 1566).
10. *Sharḥ al-Manhaj al-Muntakhab* by Ahmad ibn ʿAlī al-Manjūr (Mālikī) (d. 995 / 1588).

#### 2.3.3.4.1. *Al-Ashbāh wal-Nazāʿir* by al-Suyūṭī.

*Al-Ashbāh wal-Nazāʿir* by Jalāluddīn al-Suyūṭī (No. 1 in the list above) is considered the most comprehensive and well-organised pre-modern *qawāʿid* book.<sup>135</sup> Being so, in fact, is not surprising for a number of

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<sup>135</sup> Al-Bāḥusayn, *al-Qawāʿid*, 341.



reasons; first, al-Suyūṭī is one of the most prominent scholars, who participated in many disciplines of Islamic scholarship. He wrote books on *fiqh*, *usūl al-fiqh*, *ḥadīth* methodology, grammar, *tafsīr*, *ʿulūm al-qurʾān* and *qawāʿid*, all of which were praised in later tradition for their accurate methodology, comprehensiveness and organisation. They have always amongst the indispensable references for the authors who came later on up to the present time. Second, although the book contains other subjects besides *qawāʿid* in accordance with the title *al-ashbāh wal-naẓāʾir*, the treatment of *qawāʿid* is well-organised, covering almost all of the related elements, including their wordings, origins, scope of applications, exceptions and hints on their historical review. Third, the book was compiled at a later stage, and was preceded by many books on the same subject; hence it draws on this established tradition of writing. Focusing on this point, Rashid al-Amiri said,

al-Suyūṭī has avoided falling into some of the mistakes which his predecessors have fallen in, such as mentioning issues of *usūl al-fiqh*, and tried to emulate every advantage which has distinguished any of the earlier books and gave it a kind of privilege over the other books, such as stating the evidences of the legal maxims from the Qur'an and the *Sunnah*, as he considered this a part of his methodology...<sup>136</sup>

Besides the introduction, al-Suyūṭī divided the book into seven chapters.<sup>137</sup> In the introduction, he talked first about the importance of *qawāʿid* in *fiqh* literature, and then he listed the division and contents of the book, stated the methodology he would follow when discussing *qawāʿid* specifically. He also mentioned the reason that motivated him to write *al-*

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<sup>136</sup> Al-Amiri, *Legal Maxims*, pp. 145-146.

<sup>137</sup> Al-Suyūṭī, *al-Ashbāh*, pp. 4-5.

*Ashbāh wal-Nazāʾir*.<sup>138</sup> The first chapter concerns the five universal *qawāʿid*, each of which was discussed in an exclusive treatment. This includes mentioning the evidence from the *Qurʾān* and the *Sunnah*, the applications to *fiqh* including some disputed related issues, subsidiary *qawāʿid* and exceptions. The treatment, however, was not balanced in terms of the space assigned to each. The first was introduced in about 40 pages, the second in 23 pages, the third in 6 pages, the fourth in 5 pages and the fifth in 11 pages in the printed edition.<sup>139</sup> The second chapter is on *al-qawāʿid al-kulliyyah*, i.e. the principles which are applicable to many particulars from various chapters. However, they are, in their scope of application, less than that of the five universal *qawāʿid*. He listed forty such principles and discussed each in detail.<sup>140</sup> The third chapter is on twenty *qawāʿid*, which are disputed within the Shāfiʿī school.<sup>141</sup> The fourth chapter is the longest chapter and is on various legal determinations of different categories of people and contracts. For example, the legal rulings for the blind, the child, the coerced person, the marriage and divorce contracts and so on, where he mentions, when applicable, the *qawāʿid* or *dawābiṭ*, which control the legal particulars of these legal themes.<sup>142</sup> The fifth chapter is on some preliminary *fiqh* subjects intended to be for beginners, as al-Suyūṭī declared in the introduction.<sup>143</sup> The kinds of water which are valid or invalid for ablution, conditions for a valid prayer, description of the funeral prayer, kinds of fasting and many others are

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<sup>138</sup> Ibid., pp. 3-6.

<sup>139</sup> Ibid., pp. 8-98.

<sup>140</sup> Ibid., pp. 101-162.

<sup>141</sup> Ibid., pp. 162-187.

<sup>142</sup> Ibid., 188-422.

<sup>143</sup> Ibid., 5.

among the subjects introduced in this chapter. However, many *qawāʿid* and *dawābiṭ* are scattered within these subjects.<sup>144</sup> The sixth chapter is on *furūq* (distinctions) between similar issues, such as the distinction between Friday prayer and the *ʿid* prayer, the distinction between hire and sale, and the distinction between testimony and reporting or narration.<sup>145</sup> The last chapter, which is also the shortest, is on different legal issues, which do not appear to be relevant to any of the subjects of the previous chapters.<sup>146</sup> For example, the issues about which ignorance does not allow the person an excuse; the issues on which the *fatwā* in the Shāfiʿī school is in accordance with al-Shāfiʿī's *al-raʾy al-qadīm* (old view). Again there are a number of *dawābiṭ* in this chapter, which may justify why al-Suyūṭī included such subjects in this book.

However, although the book is one of the best on this field, the well-known and strong personality of al-Suyūṭī seldom breaks through. It is full of quotations from different sources, and one can clearly notice how much he benefited from the books of the scholars before him, such as ibn al-Wakīl, al-Subkī and al-Zarkashī. The main effort was to comment on or explain certain quotations from these sources when required, or to simply state conclusions.<sup>147</sup> Perhaps the importance of this book lies in that it is one of the most well-organised works devoted to the presentation of *qawāʿid*, although it contains researches on other legal subjects. It may not be an exaggeration to say that the chapters which were specified for *qawāʿid* contain precisely what the reader looks for when intending to find

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<sup>144</sup> Ibid., pp. 423-515.

<sup>145</sup> Ibid., pp. 515-531.

<sup>146</sup> Ibid., pp. 531-541.

<sup>147</sup> Al-Amiri, *Legal Maxims*, pp. 144-145.

out about the subject, especially with regard to the particulars to which each of the *qawā'id* is applicable.

#### 2.3.3.4.2. *Īdāh al-Masālik* by al-Wansharīsī.

*Īdāh al-Masālik* by Ahmad al-Wansharīsī is a well-known work on *qawā'id* in the Mālikī school of law, which has been described as 'a useful *fiqhī* philosophy'<sup>148</sup>. The full name of the book is *Īdāh al-Masālik ilā Qawā'id al-Imām Abī 'Abdillāh Mālik*, which clearly indicates that the book is devoted to discuss the *qawā'id* of the Mālikī school of law exclusively. It was edited and published twice, first in Rabat in Morocco in 1980 by Aḥmad al-Khaṭṭābī, and the second in Tripoli in Libya in 1990 by al-Ṣādiq al-Ghiryānī.<sup>149</sup> For the latter, it was originally a PhD thesis submitted to the Faculty of Arts, the University of Exeter in October 1983.

The book discusses 125 *qawā'id*, under which more than a 1000 legal particulars have been mentioned as applications. The *qawā'id*, which were discussed in this book can be classified into three categories as follows.<sup>150</sup>

1. Agreed general *qawā'id*, which are applicable to particulars from many chapters of *fiqh*. Unlike the other categories, these *qawā'id* are usually presented in a statement style to indicate that they are indisputable. However, this type of *qawā'id* is also found in the writings of the other schools of law. An example of this type is the *qā'idah* number 103 in the book which says, '*al-darūrāt tubīḥu al-maḥdūrāt*', meaning that necessity

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<sup>148</sup> Muhammad Ibn al-Ḥasan Al-Ḥajawī, *al-Fikr al-Sāmī Fī Tārīkh al-Fiqh al-Islāmī*, First Edition, (Medina: al-Maktabah al-ʿIlmiyyah, 1396 A. H), 2:265. See also: al-Nadwī, *al-Qawā'id*, 204.

<sup>149</sup> Ahmad Al-Wansharīsī, *Īdāhul-Masālik Ilā Qawā'id al-Imām Abī 'Abdillāhi Mālik*, ed. al-Ṣādiq al-Ghiryānī, (Beirut: Dār Ibn Ḥazm, 2006), the introduction of the editor, 5.

<sup>150</sup> Ibid. pp. 39-40.

renders lawful what is originally unlawful. There are 20 such *qawā'id* in the book.

2. General but controversial *qawā'id*. The *qawā'id* of this type are usually stated in interrogative style, which end with question marks in the printed edition, to indicate that the content of each is not unanimously agreed upon by the jurists. Nearly half of the *qawā'id* which are discussed in this book belong to this type. For example, the first *qā'idah* in this collection says, '*al-ghālibu hal huwa kal-muḥaqqaqi am lā?*', which means: is the legal ruling of what is most likely to happen equal to that which is certain?

3. *Qawā'id* which are from the *dawābiṭ* category<sup>151</sup> yet are still not agreed upon by the jurists within the *madhhab*. They are also stated in interrogative style to indicate their controversial nature. There are 42 *qawā'id* of this type in this book. For example, *qā'idah* number 112 in the book says, '*al-shuf'atu hal hiya bay'un aw istiḥqāq?*', which means, does pre-emption have the effect of a sale or the effect of re-claiming?

Despite the importance of *Īdāḥ al-Masālik* in the field of *qawā'id*, it has been subjected to many criticisms in its style and methodology. The book is hard to understand, because long and complicated phrases and sentences are frequently used, and in many cases the formation of *qawā'id* comprise classifications and conditions related to the particulars to which they are applicable.<sup>152</sup> For example, each of the *qawā'id* 35, 75 and 95 is three lines long and contains explanations and arguments. The book is also said to be nothing but a summary of the abovementioned *al-Qawā'id* of al-

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<sup>151</sup> *Dawābiṭ*, as explained in many places, are those *qawā'id* each of which is applicable to one single chapter of *fiqh*.

<sup>152</sup> Al-Wansharīsī, *Īdāḥ al-Masālik*, the introduction of the editor, 41. Al-Bāḥusayn, *al-Qawā'id*, 342. Al-Nadwī, *al-Qawā'id*, 205.

Maqqarī, since most of the *qawā'id* included in this book are similar to those in al-Maqqarī's *al-Qawā'id*, and in some cases identical, although al-Wansharīsī mentioned al-Maqqarī only twice explicitly throughout the book.<sup>153</sup> However, the existence of many *qawā'id* other than those in al-Maqqarī's book, and the extensive inclusion of the *fiqhī* particulars as examples to illustrate every *qā'idah*, in addition to confining the book to the Mālikī *qawā'id* make *Īdāḥ al-Masālik* different from *al-Qawā'id*.<sup>154</sup> What is also striking is that al-Wansharīsī omitted any reference or discussion of many of the most inclusive *qawā'id* in his collection, such as the five universal *qawā'id*. However, this may be explained by saying that his intention was to discuss the less known legal principles and give them more presence and evaluation.<sup>155</sup>

#### 2.3.3.4.3. *Al-Ashbāḥ wal-Naẓā'ir* by Ibn Nujaym.

*Al-Ashbāḥ wal-Naẓā'ir* by ibn Nujaym al-Miṣrī is considered to be one of the most comprehensive and well-organised works in the Ḥanafī school of law in which *qawā'id* were discussed in details in more than one third of the book.<sup>156</sup> Al-Ḥamwī (d. 1098 / 1687) described it as 'an ocean which comprises the pearls of the facts'.<sup>157</sup> It came after a long interval in the Ḥanafī efforts in the field of *qawā'id*, since no book has been reported to be compiled by a Ḥanafī scholar after *Ta'sīs al-Nazar* of al-Dabbūsī in

<sup>153</sup> Al-Maqqarī, *al-Qawā'id*, the introduction of the editor, 1:167. Al-Wansharīsī, *Īdāḥ al-Masālik*, the introduction of the editor, 43. See also: al-Amiri, *Legal Maxims*, 148.

<sup>154</sup> Al-Amiri, *Legal Maxims*, pp. 148-149.

<sup>155</sup> Al-Nadwī, *al-Qawā'id*, 205.

<sup>156</sup> Ibn Nujaym, *al-Ashbāḥ*, the introduction of the editor, 4. Al-Nadwī, *al-Qawā'id*, 170.

<sup>157</sup> Ibn Nujaym, *al-Ashbāḥ*, the introduction of the editor, 9.

the fifth century.<sup>158</sup> It is a fact, as it will be stated later on, that most of the Ḥanafī *qawā'id* works in the following centuries had dealt with *al-Ashbāh* of ibn Nujaym in one way or another, as it was the subject matter of more than 40 books, where it has been commented on, elaborated, explained or summarised both in treatises or versified poems.<sup>159</sup>

However, the fact that the Ḥanafīs were the first to compile *qawā'id* in separate treatises did not prevent ibn Nujaym acknowledging the superiority of the Shāfi'īs in this field. He admitted in the introduction that although the Ḥanafī jurists have written many unprecedented and excellent books in *fiqh*, none has produced a book, which comes close to *al-Ashbāh wal-Naẓā'ir* of al-Subkī al-Shāfi'ī.<sup>160</sup> Perhaps the aspiration of ibn Nujaym was to write a book similar to that of al-Subkī. This may be amongst the motivations behind the compilation of his book. However, it seems that this book is a final stage in a project which deals with *al-qawā'id al-fiqhiyyah*.<sup>161</sup> It was preceded by two other books in this field, namely; *al-Fawā'id al-Zayniyyah fī Fiqh al-Ḥanafīyyah* and a small treatise titled *Al'āl Allatī Tuf'al fil-Ṣalāh 'Alā Qawā'id al-Madhāhib al-Arba'ah*. The first is included within *al-Ashbāh wal-Naẓā'ir* as ibn Nujaym himself stated in the introduction, whereas the second is apparently a comparative study between the *qawā'id* of the four schools of law in a single chapter; namely, the actions of prayers.

The book was introduced with seven chapters. The first was dedicated to a discussion on *al-qawā'id al-fiqhiyyah*. The second concerned

<sup>158</sup> Al-Nadwī, *al-Qawā'id*, 170.

<sup>159</sup> Al-Bāḥusayn, *al-Qawā'id*, 360.

<sup>160</sup> Ibn Nujaym, *al-Ashbāh*, 10.

<sup>161</sup> Al-Amiri, *Legal Maxims*, 151.

with what he called *al-fawā'id* (the benefits), where he mentioned around 500 *fā'idah*, including classifications, conditions, controllers and other useful intellectual *fiqhī* items relate to the different chapters and themes of *fiqh*. The third was for what he titled *al-jam' wal-farq* where he discussed the similarities and differences amongst many *fiqhī* themes. The fourth was dedicated to stating *al-alghāz* (the riddles), which were always raised amongst the scholars or in classes; each is introduced accompanied by its answer. The fifth is on *al-ḥiyal* (the tricks or ways out of legal trouble), which are interesting suggestions, based on deep knowledge of *fiqh*, which one may need to learn to extricate themselves legally out of trouble. The sixth concerns *al-furūq*, i.e. those issues which are seemingly similar, but certain considerations make them different in their legal rulings. The last chapter is on the stories and correspondence between the scholars on *fiqhī* issues, and a number of intellectual anecdotes designed to entertain readers and students.<sup>162</sup>

Unlike al-Suyūṭī and al-Subkī, ibn Nujaym mixed the five universal *qawā'id* with other inclusive ones under the title of *al-qawā'id al-kulliyyah* (the inclusive legal principles).<sup>163</sup> He also, unprecedentedly, increased the number of the universal *qawā'id* into six instead of five, adding the maxim which says, '*lā thawab illa bi-niyyah*' (no reward (in the afterlife) for the deeds without examining the intention behind them).<sup>164</sup> Scholars did not agree with ibn Nujaym on this point, stating that the candidate is obviously a subsidiary *qā'idah* which can be placed under the first of the five *qawā'id*, i.e. *al-umūr bi-maqāṣidihā* (matters are judged in light of the

<sup>162</sup> Ibn Nujaym, *al-Ashbāh*, pp. 1-8.

<sup>163</sup> Ibid., 14.

<sup>164</sup> Ibid.



intention behind them). The latter is more comprehensive, as it includes the reward of the deeds to be granted in the hereafter, and the result of many worldly behaviours and criminal actions whose judgments vary, depending on the intention of the doer, while the candidate is concerned only with the rewards of the hereafter.<sup>165</sup> Similar to that of al-Suyūṭī, the discussion of the (six) universal *qawā'id* was not balanced in terms of the space assigned to each; while the second and third *qawā'id*, for example, were introduced in around 35 pages for each in the printed edition, the first, fourth, fifth and sixth were discussed in only 8 to 15 pages. However, the discussion was broad enough to include many of the related researches, such as the support from the *Qur'ān* and the *Sunnah* for the content of each *qā'idah*. For the subsidiary *qawā'id*, broad examples from the particulars were included within the scope of each, the exempted issues, etc. The remarkable thing here is that besides the universal *qawā'id*, ibn Nujaym listed only 19 *qawā'id* under the title of *al-qawā'id al-kulliyah*, which is a relatively small number compared to those included in al-Suyūṭī's list (comprising 40 *qawā'id*). This disparity between the two collections may reflect different levels of attention concerning the importance of *qawā'id* in the field of *fiqh* between the Ḥanafī and Shāfi'ī schools of law.

The reader of the book will easily find the influence of *al-Ashbāh wal-Nazā'ir* of al-Suyūṭī on its methodology, ideas and style.<sup>166</sup> On many occasions the sentences are identical, the examples used are similar, and the classifications and arrangements are comparable. Seventeen out of the nineteen *qawā'id* of his collection titled *al-qawā'id al-kulliyah* are in the

<sup>165</sup> See the introductory section by Muṣṭafā al-Zarqā to his father's book: *Sharḥ al-Qawā'id al-Fiqhiyyah*, 40.

<sup>166</sup> Al-Bāḥusayn, *al-Qawā'id*, 359.

list of al-Suyūṭī's *al-qawā'id al-kulliyyah* and were listed in the same order. However, the book contained many items, seen to lie outside of *al-ashbāh wa al-naẓā'ir*, such as the whole of the last chapter. In addition, the presence of *al-hiyal* and *al-alghāz* (riddles and tricks), in the book, is also seen to be odd, although *al-hiyal* are amongst the arts in which the Ḥanafīs in particular were interested.<sup>167</sup>

#### 2.3.4. *Qawā'id* from the Eleventh / Seventeenth to the Mid-Thirteenth/ Ninteenth Centuries.

According to some researchers<sup>168</sup>, the period from the beginning of the eleventh century onwards represents the mature stage of *ilm al-qawā'id al-fiqhiyyah* in terms of the number of works on this discipline on the one hand, and with regard to the explanation of *qawā'id* and the processes of refining them to reach to their final wordings on the other. One can, however, totally agree with the observation that a huge number of books was written in this period of time, adding extra literature to the discipline, but it may not be the same situation with regard to the quality of these works, as out of these many books, few can be described as creative or characterized by originality and newness. Most of the books were merely either commentaries on or summaries of previous works, or compositions of verses, which include *qawā'id* to help students to capture and memorise them. In contrast, few works have introduced newly coined *qawā'id* or / and refined and modified the already existing sets. This does not mean that these works were insignificant in the development of the discipline; rather,

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<sup>167</sup> Ibid., 360.

<sup>168</sup> See: al-Bāḥusayn, *al-Qawā'id*, 350; al-Nadwī, *al-Qawā'id*, 141.

it means that their contribution in this regard was not parallel to their large number. This may imply that *‘ilm al-qawā‘id al-fiqhiyyah* has already established and reached a stage of maturity, where any sort of addition to it would be of less significance. However, the considered contribution of contemporary researchers to the development of the discipline was mainly on the theoretical aspects, which is a sort of methodology in authorship, rather than to be something relates to the essence of the science.

The Ḥanafī scholars were more active in this phase and introduced tens of books, surpassing the other schools both in the number of works and in the quality of a number of these works. The Mālikīs and the Shāfi‘īs had also produced some books. In contrast, the Ḥanbalīs were almost absent for about three centuries, as until the fourteenth century no book has been ascribed to a Ḥanbalī scholar. I think that the following are potential reasons for this inactivity and the limited expansion of the works of the Ḥanbalī scholars. First, their small number compared to the followers of the other schools, which might result in that the scholars confined their authorship on other disciplines which they believe that they are more important, such as *fiqh* and *uṣūl al-fiqh*. Second, although the Ḥanbalīs have presence in some parts of Egypt Iraq and Syria, many of them inhabited remote rural places, such as *Najd* (in present-day Saudi Arabia) where the life style was still simple and primitive, and the need for developing the existing legal literature was not demanding. Third, the embrace of many of the Ḥanbalī scholars in Najd, starting from the twelfth century onwards, of the Wahhābī principles, and Wahhābism was not

welcomed in most Muslim regions. Fourth, the military expedition of Muhammad Ali Bāshā of Egypt in 1228, which overran and caused the collapse of the first Saudi state in Najd, who were Ḥanbalīs and embraced and supported the Wahhābīs.<sup>169</sup>

Be that as it may, the remarkable thing is that the large number of the books of *qawā'id* written from the beginning of the eleventh / seventeenth century up to the second half of the thirteenth / nineteenth century relate in one way or another to three books; namely: *al-Ashbāh wal-Nazā'ir* of al-Suyūṭī, *al-Ashbāh wal-Nazā'ir* of ibn Nujaym and *al-Manhaj al-Muntakhab* by al-Zaqqāq al-Mālikī. Most of them are merely either commentaries on, or summaries of the four mentioned works, and that the summaries are either in the form of prose or composition of verses.<sup>170</sup> Perhaps the significant fillip these works added to the original works was the extra and different practical examples from daily life to illustrate the *qawā'id*, which is the demand of the time and place in which the author was living.

However, there were other works that did not relate to any of the mentioned books.<sup>171</sup> For example, *Majāmi' al-Ḥaqā'iq* by Abū Sa'id al-Khādimī (d. 1176 / 1762), which is an *uṣūlī* book with an appendix of 154 *qawā'id* and *dawābiṭ* arranged alphabetically. They were mostly taken from *al-Ashbāh wal-Nazā'ir* of ibn Nujaym in addition to other sets extracted from other books of *fiqh* or formulated unprecedentedly by the author. However, some of these principles were not pure *qawā'id fiqhiyyah*; rather,

<sup>169</sup> See: Fāṭimah al-Qaḥṭānī, *Ḥamlat Ibrāhīm Bāshā 'Alā al-Dir'iyyah Wasuqūṭuhā*, (Riyadh: Dārat al-Malik 'Abdul'azīz, 1431 A.H), 246.

<sup>170</sup> Al-Bāḥusayn, *al-Qawā'id*, pp. 350-351.

<sup>171</sup> Ibid., 351.

they are *qawā'id uṣūliyyah* or mere justifications of other Ḥanafī scholars' *ikhtiyārāt fiqhiyyah* (preferred legal rulings).<sup>172</sup> However, the book has been the focus of a number of works that dealt with *qawā'id fiqhiyyah* listed in the appendix. Among these works are: 1. *Manāfi' al-Daqā'iq Sharḥ Majāmi' al-Ḥaqā'iq* by Muṣṭafā al-Kūzalḥaṣārī (d. 1215 / 1800). 2. *Īdāh al-Qawā'id Sharḥ Majma' al-Ḥaqā'iq* by Muṣṭafā Hāshim. 3. *Sharḥ al-Khātimah* by Sulaymān al-Qarahaghājī (d. 1287 / 1870).<sup>173</sup>

Now, for the purpose of giving clear presentation about *qawā'id* literature in this phase, discussion here will be in accordance with the classification mentioned above, i.e. stating, in separate groups, works which relate to each of the three abovementioned books.

#### 2.3.4.1. Works on *al-Ashbāh wal-Nazā'ir* of al-Suyūṭī.

As mentioned in the last section, *al-Ashbāh wal-Nazā'ir* by ʿAbd al-Raḥman al-Suyūṭī is considered the most comprehensive and well-organised pre-modern *qawā'id* work. The book has received special attention more than any other book within the Shāfiʿī school, and many, if not most, of the Shāfiʿī works on *qawā'id* in the following centuries were devoted to explain, comment on, or summarize it. It has also gained popularity amongst other schools of law, even by some Shīʿī scholars, and has been the focus of some of their works.<sup>174</sup> However, many of these books are either lost or still manuscripts and the knowledge about them was through the biographies of

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<sup>172</sup> Ibid., 388.

<sup>173</sup> Ibid., 389. See also: the introduction of the editor of *al-Qawā'id* of al-Maqqarī, 1:126.

<sup>174</sup> Ibid., 355.

their authors. The following is a mention of some well-known works on the book.<sup>175</sup>

1. *Al-Farā'id al-Bahiyyah Fī-l-Qawā'id al-Fiqhiyyah* by Abū Bakr ibn al-Ahdal al-Yamanī al-Shāfi'ī (d. 1035 / 1625). It is a *naẓm* (a composition of verses) which summarises the first three chapters of *al-Ashbāh* (which were essentially devoted to the different types of *qawā'id*). It is still a manuscript and available in many institutions, such as the manuscript centre of King Saud University in Riyadh. *Al-Farā'id* in turn has received the care of some scholars who wrote commentaries on it. Among them are the following works: 1. *Al-Mawāhib al-Saniyyah* by 'Abd Allah al-Jarhazī (d. 1201 / 1786). 2. *Al-Mawāhib al-'Aliyyah Sharḥ al-Farā'id al-Bahiyyah* by Yūsuf al-Baṭṭāḥ al-Ahdal (d. 1246 / 1830). 3. *Al-Fawā'id al-Janiyyah* by Muḥammad Yāsīn al-Fādānī (d. 1410 / 1990).

2. *Al-Bāhir fī-Ikhtisār al-Ashbāh wal-Naẓā'ir* by Abū Zayd al-Fāsī al-Mālikī (d. 1096 / 1685). The book is not available, but it signifies that *al-Ashbāh* of al-Suyāṭī has been dealt with by scholars from other than the Shāfi'ī school.

3. *Ḥāshiyah 'Alā al-Ashbāh wal-Naẓā'ir* by Bahā' al-Dīn al-Nā'inī al-Shī'ī al-Imāmī (d. 1133 / 1721). Again this book shows how *al-Ashbāh* of al-Suyūṭī was popular even outside the Shāfi'ī school.

4. *Sharḥ al-Qawā'id al-Khams* by Abdullah al-Dimlījī al-Shāfi'ī (d. 1234 / 1818). It is a small treatise of about 13 pages, which only summarises the first chapter of *al-Ashbāh*, on the five universal *qawā'id*.

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<sup>175</sup> Al-Būrnū, *al-Wajīz*, 102. Al-Bāḥusayn, *al-Qawā'id*, pp. 352-358.

5. *Al-Durar al-Bahiyyah Fī Ḍidāḥ al-Qawā'id al-Fiqhiyyah* by Muhammad Nūr al-Dīn Marbūbanjir al-Makkī.

#### 2.3.4.2. Works on *al-Ashbāh wal-Nazā'ir* of Ibn Nujaym.

*Al-Ashbāh wal-Nazā'ir* of ibn Nujaym has received the greatest attention ever in the history of the science of *al-qawā'id al-fiqhiyyah*. It was the focus of around forty books and treatises, and was the main source of *Majallat al-Aḥkām al-ʿAdliyyah*, which supplied the judiciary systems of many of the Islamic regions with many of legal materials and principles in codified style. However, different approaches and manners have been adopted and applied in the treatment of *al-Ashbāh* according to what the author thought about the book and the purposes intended. Some were merely short notes on the book, whereas some were relatively long commentaries. Others tend to explain it as a whole or explain some parts of it, while others rearranged its content in a different context, or summarised its researches in the form of verses and poems. Some even thought of some ideas and researches in the book to be incorrect with regard to the Ḥanafī views and subsequently wrote the corrections.

The question, likely to be raised here, is why this large number of books on a single work. Before one mentions the suggested potential reasons for this specific matter, one should consider the general historical context in which these works were written. The time was a period in which imitation was amongst the dominant features in intellectual life. For example, *al-Mukhtaṣar* of Khalīl ibn Ishāq al-Mālikī (d. 776 / 1374) has been the focus of tens, if not hundreds, of books, nearly half of which were

written in the period from the eleventh century; and although some were very valued in the explanation of the Mālikī *fiqh*, many were merely paraphrasing the previous works. It is not strange, therefore, to find such a large number of books, which dealt with *al-Ashbāh* of ibn Nujaym. However, two potential reasons have been mentioned to justify the exceptional interest in the book.<sup>176</sup> First, it is a kind of compensation of the decades in which the Ḥanafīs were inactive in the field of *al-qawā'id al-fiqhiyyah*, and perhaps to rehabilitate their status contrasting the Shāfi'īs who became so outstanding in this field, especially bearing in mind the historical intellectual competition between the two schools. Second, to review the book and correct the *fiqhī* mistakes, which are believed did not represent the predominant Ḥanafī view on many of the issues ibn Nujaym tackled. Rashid al-Amiri said,

“the commentators on his book have stated that he has mentioned some weak narrations without pointing out their weakness, and some qualified rulings without pointing out their qualifications, he has also mentioned some rulings in general and ignored some important details, and failed to mention the anomalies of some of the rulings he mentioned, and on some occasions his phrases become very complicated and closer to puzzles, and all of that made it necessary for them to write their commentaries. This is why ibn ʿĀbidīn (d. 1252 / 1836), the most prominent jurist of the later Ḥanafīs, said that a commentary of ibn Nujaym's *al-Ashbāh* should be read with it simultaneously, because a jurist cannot be sure that he will not fall into a mistake if he only read *al-Ashbāh*”.<sup>177</sup>

<sup>176</sup> Al-Amiri, *Legal Maxims*, 155.

<sup>177</sup> Ibid., pp. 155-156



The following is a sample of the books on *al-Ashbāh wal-Nazāʾir* of ibn Nujaym:<sup>178</sup>

1. *Dhakhīrat al-Nāzir Sharḥ al-Ashbāh wal-Nazāʾir* by ʿAlī al-Ṭūrī al-Ḥanafī, a student of ibn Nujaym (d. 1004 / 1595). The book is not yet published and still a manuscript in the library of al-Azhar.
2. *Zawāhir al-Jawāhir al-Naḍāʾir ʿAlā al-Ashbāh wal-Nazāʾir* by Ṣāliḥ al-Timirtāshī al-Ghazzī (d. 1055 / 1645). It is still a manuscript available in a number of libraries in Egypt.
3. *Ghamz ʿUyūn al-Baṣāʾir ʿalā Maḥāsin al-Ashbāh wal-nazāʾir* by Ahmad al-Ḥamwī (d. 1098 / 1688). This is a famous commentary on *al-Ashbāh*, which has been published several times since its first edition in 1284 A.H.
4. *Kashf al-Sarāʾir ʿAlā al-Ashbāh wal-Nazāʾir* by Muhammad al-Kufayrī (d. 1130 / 1718).
5. *Sharḥ al-Ashbāh wal-Nazāʾir* by ʿAbdul-Ghanī al-Nabulsī (d. 1143 / 1731).
6. *Sharḥ al-Ashbāh wal-Nazāʾir* by Abū al-Faṭḥ al-Dimashqī (d. 1214 / 1799).
7. *Al-Taḥqīq al-Bāhir Sharḥ al-Ashbāh wal-Nazāʾir* by Hibatullah al-Tājī (d. 1224 / 1808). The manuscripts of the previous four are available in *al-Maktabah al-Zāhiriyyah* in Damascus.
8. *Nuzhat al-Nawāzir ʿAlā al-Ashbāh wal-Nazāʾir* by Muhammad ibn ʿĀbidīn (d. 1252 / 1835). The book is originally footnotes written by ibn ʿĀbidīn on his copy of *al-Ashbāh* and collected by his student Muhammad

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<sup>178</sup> See the introduction of the editor of *al-Ashbāh wal-Nazāʾir*, pp.10-14. See also: al-Bāḥusayn, *al-Qawāʿid*, pp. 360-370. The introduction of the editor of *al-Qawāʿid of al-Ḥisnī*, 54.

al-Bayṭār. The book was published in 1983, and was edited by Muhammad Muṭī<sup>c</sup> al-Ḥāfiẓ and republished in Dār al-Fikr in Damascus in 1986.

9. *Ḥāshiyah ʿAlā al-Ashbāh wal-Naẓāʾir* by Muhammad Anwarshāh al-Kishmīrī (d. 1352 / 1932).

#### 2.3.4.3. Works on *al-Manhaj al-Muntakhab* by al-Zaqqāq.

*Al-Manhaj al-Muntakhab* by Ali ibn Qāsim al-Tajībī, known as al-Zaqqāq, is considered to be amongst the significant works on *qawāʿid* in the Mālikī school of law. It is a composition of 443 verses which includes a great amount of the Mālikī *qawāʿid* and *ḍawābiṭ*.<sup>179</sup> Generally speaking, the main purpose of putting the researches of the various disciplines of Islamic scholarship in the form of compositions of verses is to facilitate grasping them by the students, since poetry is usually easier to memorise than prose. However, the nature of poetry forced al-Zaqqāq on many occasions to use other wordings rather than the familiar known words in order to follow the regular rhythm.<sup>180</sup> The book was published several times together with one of the commentaries on it.

The author followed different approaches in terms of the arrangement of the *qawāʿid*. In the first part of the book, he arranged *qawāʿid* according to their theme in the same order as the works of *fiqh* (starting from the chapters of purity, prayer, fasting, *zakāh*, etc), although he in some cases failed to place *qawāʿid* in their correct places. Most of the *qawāʿid* of this part belong to the *ḍawābiṭ* type, and, subsequently, open to different views; that is why he usually stated them in an interrogative style,

<sup>179</sup> The introduction of the editor of *Īdāh al-Masālik*, 36. See also: Al-Bāḥusayn, *al-Qawāʿid*, pp. 370-371. Al-Būrnū, *al-Wajīz*, 102.

<sup>180</sup> Al-Bāḥusayn, *al-Qawāʿid*, 371.

reflecting the disagreement amongst the Mālikī scholars over their contents. In the second part, on the other hand, he collected a set of general agreed upon *qawā'id*,<sup>181</sup> many of which are in the lists of al-Suyāṭī and ibn Nujaym, which they called as *al-kulliyyāt*.

Now, the book has been received with special care by the Mālikī scholars. The remarkable thing in this regard is that quite a number of their books have dealt with it indirectly by dealing with one of the commentaries on it. Perhaps being a composition of verses does not require many to form it in the prose form. The following are some of these works.

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1. *Sharḥ al-Manhaj al-Muntakhab* by Ahmad al-Manjūr (d. 995 / 1587).<sup>183</sup>

This is a significant commentary on *al-Manhaj*, which explained its content in detailed discussions. The author restored the original wordings of the *qawā'id*, observing the disagreement in the content of some of them by presenting them in the interrogative style. He illustrated every single *qā'idah* by giving many examples from the particulars, to which it is applicable. He stated the different views in the cases where there are disagreements on the content of the *qawā'id*, quoting the statements of the different parties. The remarkable thing in this book is the significant number of references the author used, around seventy books. However, he has been subjected to many criticisms, especially with regard to the methodology he followed. For example, although he referred to many books,

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<sup>181</sup> Ibid.

<sup>182</sup> See the introduction of the editor of *al-Qawā'id* of al-Maqqarī, 1:131. Al-Bāḥusayn, *al-Qawā'id*, pp. 372-376. Al-Zuhaylī, *al-Qawā'id*, 39.

<sup>183</sup> As is shown, the author belongs to the tenth century, yet since the discussion here is on *al-Manhaj*, I preferred to mention it within this section for the purpose of presenting broad information about *al-Manhaj*.

he failed in many occasions to mention the references. Furthermore, in a number of cases he attributed to the Mālikī school what is not the actual (official) approved view without giving explanation.<sup>184</sup> Nevertheless, the book has frequently been amongst the authentic Mālikī *qawā'id* and *fiqh* references. It has been summarized by Abū al-Qāsim al-Tuwātī, a Libyan scholar, sixty years ago in a short treatise titled *Al-Is'āf bil-Talab*, which was edited by Ḥamzā Abū Fāris and °AbdulMuṭṭalib Qinqāshah and published by Dār al-Ḥikmah in Tripoli in 1997.<sup>185</sup> Finally, the book (*Sharḥ al-Manhaj al-Muntakhab*) was edited by Muhammad al-Shaykh Muhammad al-Amīn and submitted to the Islamic University of Madīnah in Saudi Arabia as a PhD thesis.<sup>186</sup>

2. *Al-Takmil* by Muhammad ibn Ahmad Mayyārah (d. 1072 / 1661). This book is also a composition of verses, and was intended to be a completion of *al-Manhaj al-Muntakhab*, adding to it around 225 verses. It was published in a single volume together with *al-Manhaj* and *Sharḥ al-Manhaj* of al-Manjūr in Fez in 1305 A.H.<sup>187</sup>

3. *Sharḥ Takmil al-Manhaj al-Muntakhab* by °Abd al-Qādir al-Siljamāsī (d. 1187 / 1773). It is a commentary on *al-Takmil* of Mayyārah.

4. *Al-Manhaj Ilā al-Manhaj* by Muhammad al-Amīn al-Jakanī al-Shinqīṭī (d. 1325 / 1907). It was edited by al-Ḥasan ibn °Abd al-Rahmān al-Shinqīṭī and published by Dār al-Kitāb al-°Arabī in Beirut.

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<sup>184</sup> Ahmad Al-Manjūr, *Sharḥ al-Manhaj al-Muntakhab*, ed. Muhammad al-Shaykh Muhammad al-Amīn, (np: Dār Abdullah al-Shinqīṭī, nd), the introduction of the editor, pp. 54-73.

<sup>185</sup> Al-Ghiryānī, *Taṭbīqāt*, 4.

<sup>186</sup> It was published by Dār Abdullah al-Shinqīṭī without mentioning the place of the publisher or the date of publication.

<sup>187</sup> See the introduction of the editor of *Qawā'id al-Ḥisnī*, 1:61.

5. *Iʿdād al-Muhaj Lil-Istifādah Min al-Manhaj* by Ahmad ibn Ahmad al-Jakanī al-Shinqīṭī, a contemporary Mālikī scholar. It was published in Qatar by Idārat Ihyaʾ al-Turāth al-Islāmī in 1983. It is intended to paraphrase the previous work (i.e. *al-Manhaj Ilā al-Manhaj* of Muhammad al-Amīn al-Jakanī) as the author said in the introduction.<sup>188</sup>

### 2.3.5. Modern Studies on *al-Qawāʿid al-Fiqhiyyah*.

Despite the fact that extensive *qawāʿid* books have been written in the period from the fourth / tenth to the thirteenth / nineteenth centuries, the discipline has reached its full mature stage only when *Majallat al-Aḥkām al-ʿAdliyyah* was introduced in 1286 / 1869 . Since then, characteristics of the discipline have been completely determined, and it has become a fully distinguished sort of science.<sup>189</sup> A large number of books were produced to discuss *al-qawāʿid al-fiqhiyyah* exclusively, distinguishing them from other sorts of *qawāʿid* of other disciplines of legal thought, such as *uṣūl al-fiqh* and *maqāṣid al-sharīʿah*. Theoretical and historical aspects of the discipline have also received significant treatments, which have rarely been tackled in works of the previous phases.<sup>190</sup> Furthermore,

<sup>188</sup> Ahmad al-Jakanī al-Shinqīṭī, *Iʿdād al-Muhaj Lil-Istifādah Min al-Manhaj*, (Duḥā: Idārat Ihyaʾ al-Turāth al-Islāmī, 1983), 10.

<sup>189</sup> ʿAbdussalām Al-Ḥaṣīn, *al-Qawāʿid wal-Ḍawābiṭ al-Fiqhiyyah Lil-Muʿāmalāt al-Māliyyah ʿInd Ibn Taymiyyah*, (Cairo: Dār al-Taʾaṣīl, 2002), 88. Al-Bāḥusayn, *al-Qawāʿid*, 303.

<sup>190</sup> Perhaps the only exception here is the classifications of *qawāʿid* in terms of their scope of application on particulars. They have been categorized as universal, *kullīyyāt* and *ḍawābiṭ* or special *qawāʿid* by a number of traditional scholars, such as al-Subkī, al-Suyūṭī and Ibn Nujaym in their books (all titled *al-Ashbāh wal-Naẓāʾir*). In addition, on many occasions, some authors did mention that a particular *qāʿidah* was first uttered by such and such persons, be he the Prophet (BPUH) a companion or a leading figure. Examples will be mentioned in the following chapters.

various approaches have been adopted in writing on *qawā'id*, which are in many ways different from those in the past, as will be stated later on.

Therefore, modern studies on *qawā'id* are distinguished from classical works in several ways. Firstly, they include and study *qawā'id fihiyyah* exclusively; i.e. their treatments do not include *qawā'id* of other genres of legal thought, such as *qawā'id* of *uṣūl al-fiqh* or of *maqāṣid al-Sharī'ah* nor linguistic or logic rules, which were always mixed with *qawā'id al-fiqh* in the classical works. The 99 *qawā'id* of *Majalla* are, in this context, pure *qawā'id fihiyyah*. Likewise, *Mawsū'at al-Qawā'id al-Fiqhiyyah* by Muhammad Ṣidqī al-Būrnū (2003), which include more than 4000 principles all of which are either *qawā'id* or *dawābiṭ fihiyyah*. Secondly, the methodology and approaches which are followed in authorship on *qawā'id* were different from what classical books used to follow. The main concern of classical works was to collect *qawā'id* and show their applications to *fiqh* particulars. Many of them were mere commentaries on previous works, explaining them and adding more examples of application to new issues, which appeared in the time of the commentators. In contrast, modern works are more systematic in their treatments of the subject. Many were concerned with the historical and theoretical aspects of the genre, which were neglected by classical works. Others studied specific *qawā'id* comprehensively, discussing their history, sources, applications and other related subjects. Some collected and studied sets of *qawā'id* on specific *fiqhī* themes. A number of authors chose to write encyclopaedias that include a huge number of *qawā'id*, which significantly serve *ijtihād* and intellectual activities of contemporary individual jurists

and academic institutions who work to reach the judicial judgments for novel issues, be they financial, medical, political, etc. More elaboration and examples of works will be given later on.

There must have been reasons behind this development and progress in the methodology and approaches. One can think about such reasons as follows; firstly, the sort of renaissance in intellectual and academic life in the Muslim world in the nineteenth and twentieth centuries had a significant impact in improving the ways of authorship in various fields. Secondly, many Muslim scholars and academicians had opportunities to be in touch with different Western academic institutions and benefitted from their experiences in writing methodologies and ways of presentation. Thirdly, academic orientation towards editing the legacy of Islamic scholarship, and the contribution of postgraduate students in these activities (by dealing with relevant subjects in their theses) must have also played a crucial role in this regard, due to the nature of the requirements of research.

*Majallat al-Aḥkām al-ʿAdliyyah* was the starting point for modern studies on *qawāʿid*. Hence, special care will be given to it in the following section. This will be followed by a detailed section on *qawāʿid* works in more recent times.

### 2.3.5.1. *Majallat al-Aḥkām al-ʿAdliyyah*.<sup>191</sup>

The *Majalla* is the first codification of Islamic commercial law, which includes 1851 articles. Although it was a product of what was known as *Tanzīmāt* (the Ottoman reform movement, which started in 1839 with the Gülhane charter and brought about numerous changes in the Ottoman Empire). This was one of the means of preserving Islamic institutions, while the Ottoman Empire was changing from an Islamic to a Western society. It was based upon the Ḥanafī school of law, so it did not introduce new principles of law. It only codified the Islamic principles, which had served as the civil law of the Ottoman Empire.<sup>192</sup>

The *Majalla* was written in Turkish in the year 1286 / 1869 and remained the civil code of the Ottoman Caliphate for about fifty years (from 1877 to 1926 AD), and continued to be the commercial law of many Arab countries, such as Syria, Iraq, Kuwait, and Jordan.<sup>193</sup> Its full Turkish name is *Mejelle Ahkami Adliyyi*, which means “the book of rules of justice”.<sup>194</sup> The authors of the *Majalla* were major Ḥanafī jurists selected specifically to form what was called the “*Mejelle* Commission” (a seven-man

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<sup>191</sup> I stated in a footnote in the introduction that I will use the full Arabic name, i.e. *Majallat al-Aḥkām al-ʿAdliyyah*, or the short name: *Majalla*, although its original name is *Majallah el-Ahkam-i-Adilya*. I justified this by saying that it is known in Arab-Islamic scholarship as *Majallat al-Aḥkām al-ʿAdliyyah* or briefly *Majallah* or *Majalla*, and is mentioned as such in some English articles. See: S. S. Onar, ‘The Majalla’, in: Majid Khadduri and Herbert J. Liebesny (ed), *Law in the Middle East*, Vol. I, (New York: AMS Press, 1984), pp. 290-321. See also: Aznan Hasan, “A Comparative Study of Islamic Legal Maxims in Majallat al-Aḥkām al-ʿAdliyyah, Jordanian Civil Code and United Arab Emirates Law of Civil Transaction”, in *the Islamic Quarterly*, Vol. 48, No. 1, 2004, pp. 47-68.

<sup>192</sup> S. S. Onar, ‘The Majalla’, in: Majid Khadduri and Herbert J. Liebesny (ed), *Law in the Middle East*, Vol. I, (New York: AMS Press, 1984), pp. 290-321, at: 292. See also: Laldin, *A Mini Guide*, 104. The introduction of the editor of *al-Qawāʿid* of al-Ḥiṣnī, 56.

<sup>193</sup> Al-Zuhaylī, *al-Qawāʿid al-Fiqhiyyah Wataʿbiqātuhā*, 1:49.

<sup>194</sup> See the foreword of the English translation of the *Majallah: The Mejelle*, Trans. by: C.R. Tyser, D.G. Demetriades and Ismail Haqqi Effendi, Second Reprint, (Kuala Lumpur: the Other Press, 2007), Page: v.



committee), headed by Cevdet Pasha (an eminent jurist and statesman and director of the Bureau of Legislation) and included renowned scholars, such as ʿAlāʿuddīn ibn ʿĀbidīn (son of Muhammad Amīn ibn ʿĀbidīn, famous Ḥanafī jurist from Syria) and Amīn al-Jundī.<sup>195</sup>

The significance of the *Majalla* lies in that it was the first systematic codification of Islamic law. In this regard, it occupied very high status in the Muslim world, and has been the inspiration for tremendous attempts at codifying Islamic law. Moreover, it filled a significant lacuna in the field of the judiciary and of legal transactions, and solved many pressing issues in commercial law and obligations. However, one of the good things about the *Majalla* is its simple language; so that even the persons without a deep background in the style and usage of classical *fiqh* texts could understand it. This is applicable even to its Arabic and English translations. Perhaps the nature of codification required a firm and clear exposition of Islamic law, and for the articles to be free from conflicting opinions.<sup>196</sup>

The *Majalla* comprises 1851 articles concerned with areas of civil law. It has been arranged in a preface and sixteen books. The preface consists of 100 articles, all of which, except for the first, are *qawāʿid fiqhiyyah*. The first article, which occupies around two pages, concerns the definition and divisions of *ʿilm al-fiqh*. Articles 101 and onwards state the principles of law governing various sections of Islamic commercial law,

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<sup>195</sup> See for the names of the members of the committee: the report which was submitted by the committee to the officials attached to the *Majalla*. *Al-Majalla*, (Beirut: al-Maṭbaʿah al-Adabiyyah, 1302 A.H.), 23.

<sup>196</sup> See the report of the committee in: *al-Majalla*, 19. See also: Aznan Hasan, 'A Comparative Study of Islamic Legal Maxims in Majallat al-Ahkam al-ʿAdliyyah, Jordanian Civil Code and United Arab Emirates Law of Civil Transaction' in: *The Islamic Quarterly*, Volume: 47, (London, 2004), pp. 44-67, at: 48.

such as *bayʿ* (sale), *ijārah* (hire), *kafālah* (quarantee), *rahn* (pledges), *sharikah* (joint ownership) etc. The articles of the last four chapters are on the law of evidence and procedures in the court of law.<sup>197</sup> For the 99 *qawāʿid* stated in the preface, they were taken mostly from *al-Ashbāh wal-Nazāʾir* of ibn Nujaym.<sup>198</sup> The *Majalla* Commission, explaining the reason for selecting these *qawāʿid*, said:

“Lawyers, who have studied *fiqh*, have converted the propositions of *fiqh* into a number of universal rules. Every one of which while it embraces and contains many propositions, is taken as evidence for the proof of these propositions being from the admitted truths in the sacred law books. And, in the first place, the understanding of these rules gives familiarity with the propositions, and is a means of fixing the propositions in the mind. Therefore, there have been collected ninety-nine rules of the *fiqh*, and they have been brought forward to form the second part of the preface as set out below, before commencing that which is the object of our work”.<sup>199</sup>

The 99 *qawāʿid* in the introduction of the *Majalla* include the five universal *qawāʿid*, each is followed by a number of subsidiary principles, which serve it in one way or another. They also include most of the so-called *al-qawāʿid al-kulliyyah*, some *qawāʿid* which have dual functions, i.e. those which serve as *qawāʿid uṣūliyyah*, and a few linguistic rules, which have a kind of involvement in the legal field. However, according to some researchers, the *qawāʿid* of the *Majalla* were listed randomly; i.e. they were not listed in categories, each of which serves a legal thought.<sup>200</sup> One does not

<sup>197</sup> See the foreword of the English Translation of the *Majallah*, page v. Al-Nadwī, *al-Qawāʿid*, 179.

<sup>198</sup> Al-Baḥusayn, *al-Qawāʿid*, 377. Al-Zuhaylī, *al-Qawāʿid*, 47.

<sup>199</sup> *Al-Majallah*, pp. 24-25. The translation is borrowed from the English translation of the *Majallah*, 2.

<sup>200</sup> Al-Zarqā, *al-Madkhal al-Fiqhī*, 2:977. Al-Zuhaylī, *al-Qawāʿid al-Fiqhiyyah Wataʾbiqātuhā*, 1:47.

agree with this observation, as a reference to the *Majalla* shows that most *qawā'id* are listed coherently, and that every group expresses a legal theory, although there are no heading titles to the groups. It is true that some are intercalated, i.e. they have nothing to do with the preceding or following *qawā'id*, but these are few compared to the whole list.

As stated above, the *Majalla* occupied a very high status in the Muslim world. This is “due to the fact that the jurisdiction of the *Majalla* covered very great parts of the Islamic world governed by the Ottoman state”.<sup>201</sup> In reflecting the aspirations of the numerous attempts to codifying Islamic law, many major commentaries - both in Arabic and Turkish - were written on the articles it comprises, explaining their meaning and indicating their sources. It has also been translated into several languages, such as Arabic, English and Malay. It is a remarkable thing in this context that most of what is written on the *Majalla* was by Ḥanafī scholars. However, although many commentaries were on the whole of the *Majalla*, some were written to deal only with the 99 *qawā'id* in the preface, explaining them in detail. The following are the major works of both types (i.e. those which deal with the *Majalla* as a whole and those which focus only on the 99 *qawā'id* it comprises).<sup>202</sup>

1. *Sharḥ al-Majallah* by Salīm Rustum al-Bāz (d. 1328 / 1910). This is one of the early commentaries on the *Majalla*, as it was published in two volumes in 1304 / 1886. It is a short well-organised commentary, which discussed all the articles. The book was published several times in Egypt, Lebanon and Jordan. However, there are two remarkable things about the author of this

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<sup>201</sup> Al-Amiri, *Legal Maxims*, 160.

<sup>202</sup> See: al-Zuhaylī, *al-Qawā'id*, pp. 48-49. Al-Bāḥusayn, *al-Qawā'id*, pp. 378-387. Al-Amiri, *Legal Maxims*, pp. 160-161.

book. Firstly, he is a Christian lawyer from Lebanon, making this the first book on *fiqh* written by a non-Muslim figure, which gained reliability and authenticity amongst jurists and judges.<sup>203</sup> Secondly, he was only 19 when he wrote the book.<sup>204</sup>

2. *Durar al-Hukkām Sharḥ Majallat al-Aḥkām* by ʿAlī Ḥaydar (d. 1353 / 1924). It is a detailed commentary in Turkish on the whole *Majalla*. It was translated into Arabic by Fahmī al-Ḥusaynī and published in Yāfā in 1346 / 1927. It is the best among the commentaries, because of the methodology followed, where the author explains every single article, giving examples to illustrate it from previous books of *fiqh* and from the daily life of his time, mentioning sources from which a *qāʿidah* was taken and connecting it to similar articles in the *Majalla*. The book is in four volumes and was published several times.

3. *Sharḥ al-Majallah* by Khālīd al-Atāsī, the grand *Muftī* of Ḥimṣ in Syria (d. 1326 / 1908). A well-organised commentary, which is considered one of the best works on the *Majalla*. The author did not deal with the 99 *qawāʿid*, instead he started from article 101, but he died before he could finish explaining all of the articles (he reached article 1728). His son Muḥammad Ṭāhir al-Atāsī (d.1359 / 1940) then finished the explanation of the remaining articles and wrote a detailed discussion on the 99 *qawāʿid*, missed by his father. The book was published in six volumes as early as in 1931 in Ḥimṣ, but was not republished since then.

4. *Sharḥ al-Qawāʿid al-Fiqhiyyah* by Aḥmad al-Zarqā (d. 1357 / 1938). It is a commentary devoted specifically to the 99 *qawāʿid* of the *Majalla*. It was

<sup>203</sup> Al-Amiri, *Legal Maxims*, 160.

<sup>204</sup> Sāmī Al-Qabaj, *Majallat al-Aḥkām al-ʿAdliyyah: Maṣādiruhā Wa-Atharuhā Fī Qawānīn al-Sharq al-Islāmī*, (Amman, Dār al-Fatḥ lil-Dirāsāt, 2008), 177.

originally drafted over twenty years of teaching the discipline of *qawā'id* in different institutions in Syria. Being compiled in a later stage, the author benefited from the preceding works on the *Majalla*, and had his comments on them. In some occasions, he formed, unprecedentedly, some *qawā'id* he thought were necessary to express or complete some legal ideas. The book is very useful in presenting the subject in detailed elaboration that gives a general picture for each *qā'idah*, especially when it comes to the examples he gave, which to some extent, relate to the present time. However, the book was published in 1983 after the demise of the author, and was republished in 1987 by Dār al-Qalam in Damascus.

5. *Al-Qawā'id al-Fiqhiyyah Ma'a al-Sharḥ al-Mūjaz* by 'Izzat al-Da<sup>cc</sup>ās, a contemporary Syrian scholar. The book is a short commentary on the 99 *qawā'id* exclusively. However, it seems that it was intended to be for those who were not specialised in Islamic studies to give them a general idea about the subject. The book was published four times in 1965, 1979, 1989 and 1991 respectively by Dār al-Tirmidhī in Ḥimṣ.

#### **2.3.5.2. *Qawā'id* Works in the More Recent Time.**

As stated above, modern studies on *qawā'id* are distinguished from classical works in several ways, and the authorship on the genre varies with regard to methodology and approaches adopted. The following is a mention

of six different approaches used in this regard, followed by a detailed exposition of each of them.<sup>205</sup>

1. Editing traditional *qawā'id* works.
2. Extracting *qawā'id* from the traditional *fiqh* books.
3. Collecting and arranging *qawā'id* in comprehensive encyclopaedias.
4. Studying specific *qawā'id*.
5. Studying the theoretical and historical aspects of the discipline.
6. Studying *qawā'id* based on their legal theme.

#### 2.3.5.2.1 Editing Traditional *Qawā'id* Works.

The twentieth century (AD) witnessed the emergence of what is known as *Ḥarakat Ihya' al-Turāth al-Islāmī* (movements for reviving the Islamic legacy). Their main concern was to call to, and work on, editing the manuscripts on different Islamic disciplines and publish them in printed form.<sup>206</sup> Tremendous works have been published since the early decades of the twentieth century responding to the call of the movement, covering almost all the disciplines of Islamic scholarship. Books of *qawā'id* have had their share in this context, as tens of manuscripts have been edited and published. Many of them were submitted to universities and academic institutions to attain Masters or PhD degrees.

What is important in editing manuscripts, besides making them available to readers, are the historical and critical studies, which provide information about the political, social and cultural environments of the

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<sup>205</sup> See: Hamzah Hammād, *Manāhij al-Ta'lif al-Mu'āṣirah Fil-Qawā'id al-Fiqhiyyah*, (<http://www.feqhweb.com/vb/showthread.php?t=1296&page=1>). Al-Bāḥusayn, *al-Qawā'id*, pp. 403-428.

<sup>206</sup> Al-Bāḥusayn, *al-Qawā'id*, 403.

authors' times. Further, editors usually write introductory chapters or sections discussing useful subjects, such as the manuscript author's role in serving the genre (*qawā'id fiqhiyyah* in our case), how valued a manuscript is in this genre, critical overview of the content of the manuscript, etc. For example, *Īdāh al-Masālik* by al-Wansharīsī al-Mālikī (d. 914 / 1508) was edited by al-Ṣādiq al-Ghiryānī and submitted to University of Exeter in 1983 as a partial requirement for PhD in Islamic studies. The editor devoted around 40 pages to discussing several preliminary subjects pertaining to *qawā'id*, and to the author and the book. One can, however, observe that editing a manuscript is usually done in a more systematic manner, in case it is part of an academic work, perhaps due to the nature of academic research, which requires more accuracy and objectivity.

The following are samples of these books:

1. *Al-Ashbāh wal-Naẓā'ir* of ibn al-Subkī, edited by °Adil °Abdulmawjūd and °Alī Mu°awwaḍ and published in Beirut by Dār al-Kutub al-°Ilmiyyah in 1991.
2. *Al-Manthūr fī-l-Qawā'id* by al-Zarkashī, edited by Taysir Fā'iq Ahmad and published by the Ministry of *Awaqāf* and Islamic affairs in Kuwait in 1983. The editing work was originally submitted to al-Azhar University in 1977 for a PhD degree.
3. *Īdāh al-Masālik* of al-Wansharīsī, edited twice: once in Rabat in 1980 by Ahmad al-Khaṭṭābī, and the other in Tripoli, Libya by al-Ṣādiq al-Ghiryānī in 1991. The latter editing work was originally submitted to the University of Exeter for a PhD degree in 1983,

4. *Al-Majmūʿ al-Mudhhib fī Qawāʿid al-Madhhab* by al-ʿAlāʾī, edited and submitted to the Islamic University of Medinah in Saudi Arabia for a PhD degree. It was published by the Ministry of *Awqāf* and Islamic affairs in Kuwait in 1994.

#### 2.3.5.2.2. Extracting *Qawāʿid* from Traditional *Fiqh* Books.

This means to collect *qawāʿid* from a traditional *fiqhī* book or a number of books or even a chapter or more in a book. Some of the chosen books consist of several volumes making the duty burdensome. A decision whether or not a particular phrase is a *qāʿidah fihiyyah* demands meeting certain criteria pertaining *qawāʿid* formation. The overlap between different sorts of *qawāʿid* (i.e. *qawāʿid* of *uṣūl al-fiqh*, of *maqāṣid*, etc.) makes the duty more arduous and demands specific qualifications. This may explain why most of the books which followed this approach are originally academic works (Master or PhD theses). Here are some examples:

1. *Qawāʿid al-Fiqh al-Mālikī Min Khilāl Kitāb al-Ischrāf lil-Qāḍī ʿAbd al-Wahhāb*, by Muhammad al-Rūqī. It is originally a Masters thesis submitted to Faculty of Arts, Muhammad V University, Rabat in 1989. The author extracted the *qawāʿid* from a famous Mālikī *fiqhī* reference and arranged them according to their comprehensiveness and their *fiqhī* theme. The book was published for the first time by Dār al-Qalam in Damascus in 1998.

2. *Al-Qawāʿid wal-Ḍawābiṭ al-Fiqhiyyah Fī Kitāb al-Mughnī li-ibn Qudāmah* (d. 620 / 1223) by Muhammad al-Saʿdān. The book is originally a PhD dissertation submitted to Umm al-Qurā University in Makkah in 2000. The author chose particular chapters (chapters of *ḥudūd*, *jihād* and tribute)



from the book of *al-Mughnī* of ibn Qudāmah, an eminent Ḥanbalī scholar, and extracted not only *qawā'id*, but also the *ḍawābiṭ*, which demands special care. The book is still unpublished.

3. *Al-Qawā'id wal-Ḍawābiṭ al-Mustakhṣaṣah Min al-Taḥrīr lil-Imām Jamāl al-Dīn al-Ḥuṣayrī* (d.636 / 1240) by ʿAlī al-Nadwī. A PhD thesis submitted to Umm al-Qurā University in 1987 and published in Cairo by Maṭbaʿat al-Madanī in 1991. Al-Nadwī extracted the *qawā'id* and the *ḍawābiṭ* in this Ḥanafī reference and arranged them according to their legal theme.

#### **2.3.5.2.3 Collecting and Arranging *Qawā'id* in Comprehensive Encyclopaedias.**

This is effort to collect *qawā'id* from the books of *fiqh* and books of *qawā'id* and arrange them according to a specific approach. As stated above (refer to section 2.3.4.), one of the main purposes of such encyclopaedias is to serve *ijtihād* and intellectual activities of contemporary individual jurists and academic institutions (who work to reach the judicial judgments for novel issues, be they financial, medical, political, etc.) by providing them with *qawā'id* in one place instead of searching for them in *fiqhī* works. Among the books in this regard are the following:

1. *Mawsā'at al-Qawā'id al-Fiqhiyyah* by Muhammad Ṣidqī al-Būrṇū. This encyclopaedia consists of twelve volumes, where *qawā'id* are arranged alphabetically by their first words. The total number of *qawā'id* is 4192 covering almost all the chapters of *fiqh*. The author after stating every single *qā'idah*, explains it very briefly, mentioning a few of its applications,

and a few of its anomalies if any.<sup>207</sup> The whole book was published in 2003 by Mu<sup>ṣ</sup>assasat al-Risālah in Beirut.

2. *Mawsū<sup>ṣ</sup>at al-Qawā<sup>ʿ</sup>id wal-Dawābiṭ al-Fiqhiyyah al-Hākimah lil-Mu<sup>ṣ</sup>amalāt al-Māliyyah fil-Fiqh al-Islāmī* by Ali al-Nadwī. Unlike the encyclopaedia of al-Būrnū, al-Nadwā collected *qawā<sup>ʿ</sup>id*, which relate to *fiqh al-Mu<sup>ṣ</sup>amalāt* (transactions), where he collected 3107 *qawā<sup>ʿ</sup>id* and *dawābiṭ*. He explained the *qawā<sup>ʿ</sup>id* he thought were the most significant, and just arranged the rest alphabetically. The book was published in 1999 in Kuwait by Dār <sup>ṣ</sup>Ālam al-Ma<sup>ṣ</sup>rifah.

3. *Ma<sup>ṣ</sup>lamah al-Qawā<sup>ʿ</sup>id al-Fiqhiyyah* which is a major project launched by *Majma<sup>ṣ</sup> al-Fiqh al-Islāmī* (the International Islamic Fiqh Academy).<sup>208</sup> The aim of the *Ma<sup>ṣ</sup>lamah* (which means a major encyclopaedia) basically is to collect all of the *qawā<sup>ʿ</sup>id fiqhiyyah* scattered in the main sources of *fiqh* of the four schools of law, used by *fuqahā<sup>ṣ</sup>* in the course of history of Islamic scholarship. The *Majma<sup>ṣ</sup>* appointed Dr. Alī al-Nadwī and Dr. Muhammad al-Būrnū to be the coordinators to achieve this project. The goal was to collect *qawā<sup>ʿ</sup>id* scattered in 120 *fiqhī* books. However, although many scholars have participated in this project, it is still in the early stage, and nothing has been published as yet.

#### 2.3.5.2.4. Studying Specific *Qawā<sup>ʿ</sup>id*.

This approach comprises choosing a major *qā<sup>ʿ</sup>idah* to write about, discussing all relevant topics in detail. The approach seems to have resulted

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<sup>207</sup> Al-Amiri, *Legal Maxims*, 162.

<sup>208</sup> The *Majma<sup>ṣ</sup> al-Fiqh al-Islāmī* is one of the institutions related to the Organization of Islamic Congress (OIC) in Jeddah, KSA.

from of the method of narrowing the research subject, which seems to be the outcome of contact with some Western institutions that demand from postgraduate candidates to be specific in their proposals for the degrees. The following are some of the books, which adopted this method.

1. *Al-Niyyah Wa-ʿatharuhā Fil-Aḥkīm al-Sharʿiyyah* by Ṣāliḥ al-Sadlān, which is a PhD thesis submitted to Imam Muhammad ibn Saʿūd University in Riyadh in 1983 and published by Maktabat al-Kharījī in Riyadh in 1984. The book is about the first of the five universal *qawāʿid*, i.e. “*al-umūr bi-maqāṣidihā*” (matters are judged in light of the intention behind them), discussing it in detail.

2. *Qāʿidat “Iʿmāl al-Kalām Awlā Min Ihmālih”* by Maḥmūd Muṣṭafā Harmūsh, which is a Masters thesis submitted to Imām Muhammad Bin Saʿūd University in Riyadh, Saudi Arabia. The study is a comprehensive piece of work where the author tried to tackle all the *fiqhī* and *uṣūlī* topics related to this *qāʿidah*, namely (a word should be construed as having some meaning, rather than passed over in silence). It was published for the first time in Beirut in 1987.

3. *Qāʿidat al-ʿĀdah Muḥakkamah, Dirāsah naẓariyyah Taʿṣiliyyah Taṭbīqiyyah* by Yaʿqāb al-Baḥusayn. It is a book on the role of custom in the judicial system based on this *qāʿidah* which means “custom is the basis of judgment”. The book was published by Dār al-Rashīd in Riyadh in 2002.

#### **2.3.5.2.5. Studying Theoretical and Historical Aspects of *Qawāʿid* Genre.**

This is the most distinguished approach, as followed by modern works. The fact is that most, if not all, of the traditional works, neglected

discussing such areas of research, and focused instead on the scope of application of *qawā'id*. However, a reference to other major Islamic disciplines shows that this is the situation with them all. For example, works on the history of *fiqh* development were produced in the twentieth century. *Khulāṣat al-Tashrī' al-Islāmī* by °Abd al-Wahhāb Khallāf is one of the pioneering works in this regard, and was first published in the fifties of the last century. Likewise, *Tarīkh al-Tashrī' al-Islāmī* by Mannā° al-Qaṭṭān was also published in 1962. Works of Schacht and Coulson, in this concern, were also published in the fifties and sixties of the last century. Therefore, studying history and other theoretical subjects of *qawā'id* occurring at such a late time should not be a matter of surprise.

Most PhD and Master theses on topics related to *qawā'id* have devoted sections dealing with their history. For example, °Abd al-Salām al-Ḥaṣīn's Masters thesis (entitled *al-Qawā'id wal-Ḍawābiṭ al-Fiqhiyyah lī-l-Mu°āmalāt al-Māliyyah °Inda ibn Taymiyah* and submitted to Imam Muhammad ibn Sa°ūd University in Riyadh and Published later by Dār al-Ta°sīl in Cairo in 2002) includes around 50 pages on history and preliminary topics of *qawā'id*). However, one can observe that treatments of many of these works are short discussions and mostly mere paraphrasing of previous works.

The following works are, based on my observation, the most innovative academic works in this regard.

1. *Al-Qawā'id al-Fiqhiyyah Wa-°atharuhā fil-Fiqh al-Islāmī* by °Alī Ahmad al-Nadwī, which is a Masters thesis submitted to Umm al-Qurā University in Makkah in 1984, and published several times in different places, with

some changes in the title. This is the pioneering work in this regard, which discussed the concept of *qawā'id*, their history, scope of application, types, functions and other relevant topics. Most of those who wrote on *qawā'id* since then have greatly benefited from this book.

2. *Al-Qawā'id al-Fiqhiyyah* by Ya'qūb al-Baḥusayn. This is another significant book in this regard. The author is a well-known scholar in Saudi Arabia, who specialised in writing on the theoretical aspects of disciplines of legal thought, and has produced several books in this regard. This book was published by Maktabat al-Rushd in Riyadh in 1998.

3. *Legal Maxims in Islamic Jurisprudence, Their History, Character and Significance* by Rashed al-Amiri. This is a PhD thesis submitted to the University of Birmingham in 2003, and it is, as far as I know, the sole work in English on the theoretical and historical aspects of *qawā'id*, as is clear from the title. The work is not yet published.<sup>209</sup>

#### **2.3.5.2.6. Studying *Qawā'id* Based on Their Legal Theme.**

This is to discuss and study *qawā'id*, which relate to a single subject in *fiqh*. Examples for this approach are the following two works:

1. *Al-Qawā'id al-Fiqhiyyah li-l-Taḥkīm fī-l-Sharī'ah al-Islāmiyyah* (2000) by 'Abd al-Salām Ḥāmid discusses *qawā'id* relate to arbitration according to Islamic law.

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<sup>209</sup> There is also a small section on the history of *qawā'id* in the PhD thesis of Luqman Zakariyah, which was submitted to the University of Wales, Lampeter in 2009, titled *Applications of Legal Maxims in Islamic Criminal Law with Special Reference to Shari'ah Law in Northern Nigeria (1999-2007)*, pp. 38-49. Hashim Kamali in *Sharī'ah Law: An Introduction* has also given a short mention of the history of *qawā'id* in three pages, pp. 152-154.

2. *Al-Qawā'id wal-Dawābiṭ al-Fiqhiyyah li-l-Mawād al-Muḥarramah fī-l-Ghidhā' wa-l-Dawā'* (1996) by Sa'ūd al-Thubaytī discusses *qawā'id* related to prohibited substances in food and medicines.<sup>210</sup>

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<sup>210</sup> See: Hamzah Hammād, *Manāḥij al-Ta'ālīf al-Mu'āṣirah Fil-Qawā'id al-Fiqhiyyah*, (<http://www.feqhweb.com/vb/showthread.php?t=1296&page=1>).

CHAPTER THREE

THE MOST COMPREHENSIVE

*QAWĀ'ID* (I)

*AL-QAWĀ'ID AL-KHAMS AL-KUBRĀ*

(THE FIVE UNIVERSAL MAXIMS).

## CHAPTER THREE

### THE MOST COMPREHENSIVE *QAWĀ'ID* (I)

#### *AL-QAWĀ'ID AL-KHAMS AL-KUBRĀ* (THE FIVE UNIVERSAL MAXIMS).

As pointed out in a previous section, *al-qawā'id al-fiqhiyyah* are various with regard to the scope of application over *fiqh* particulars. While some are as comprehensive as to apply to many in most of the *fiqh* chapters, some only control particulars of a single theme in a chapter, i.e. the *dawābiṭ*. Considering this, chapters three and four are dedicated to discussing in detail the most comprehensive *qawā'id*. The treatment in this chapter will be on the so-called *al-qawā'id al-khams al-kubrā* (the five universal maxims), as they are the essential elements in this regard. Chapter four will discuss the *qawā'id* that Al-Suyūṭī and ibn Nujaym described as *kulliyyāt*, i.e. *qawā'id* applying to limitless particulars, yet they are less in their scope of application than the five universal *qawā'id*. Selected *qawā'id* will be examined in the areas of speech interpretation, legal liability, and the acquisition of evidence.



### 3.1. INTRODUCTION

The five universal *qawā'id* are considered, including their subsidiaries; the most important in the whole discipline, and have been seen as representative of the entire field, so much so that other *qawā'id* are seen as a commentary on them.<sup>1</sup> Scholars found, through induction, that the scope of application of these five is as broad as to apply to many particulars in most chapters of *fiqh*. It is said that the whole *fiqh* is based on them, and the essence of the *Sharī'ah* as a whole is grasped between them.<sup>2</sup> They are, on the other hand, useful in depicting a general picture of the nature, goals and objectives of the *Sharī'ah*.<sup>3</sup> Therefore, their role is not only of being controllers of numerous particulars of *fiqh*, but also expressive, in few words, of the *maqāṣid* of the *Sharī'ah*. This may explain why the four Sunni schools of law are generally in agreement over them, and why they are the subject of wide-ranging discussions within each of the schools.

They include the following *qawā'id*:

1. *Al-umūru bi-maqāṣidihā* (matters are judged in light of the intention behind them).
2. *Al-ḍararu yuzāl* (harm must be eliminated).
3. *Al-mashaqqatu tajlibu al-taysīr* (hardship begets facility).
4. *Al-yaqīnu lā yazūlu bi-l-shakk* (certainty is not overruled by doubt).
5. *Al-ʿādatu muḥakkamah* (custom can be the basis of judgment).<sup>4</sup>

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<sup>1</sup> Kamali, *Sharī'ah Law*, 141.

<sup>2</sup> Ibid., pp. 144-145. See also: Al-Suyūṭī, *al-Ashbāh*, 4. Al-Zuhaylī, *al-Qawā'id*, 32.

<sup>3</sup> Kamali, *Sharī'ah Law*, 141.

<sup>4</sup> Al-Suyūṭī, *al-Ashbāh*, 7. Al-Bāḥusayn: *al-Qawā'id*, 118. Al-Sadlān, *al-Qawā'id al-Kubrā*, 9.

It is remarkable that the legal ideas, which the five *qawā'id* represent (namely: consideration of intention in the judgment of all matters, certainty not to be overruled by doubt, removal of hardship, elimination of harm and consideration of customs) are very integral to the general Islamic concept of *maṣlaḥah*.

In order to clarify this, *maṣlaḥah*, as defined by al-Ghazālī (d. 505 / 1111), is the preservation of religion, of life, of reason, of descendants and of property. Accordingly, what assures the preservation of these five principles is *maṣlaḥah*, and whatever fails to preserve them is *mafsadah* (evil).<sup>5</sup> However, there are three grades of *maṣlaḥah*, namely *darūriyyāt* (necessities), *ḥājiyyāt* (conveniences) and *taḥsīniyyāt* (refinements). The strongest kind of *maṣlaḥah* is preservation of the above-mentioned five principles, which is covered in the grade of *darūriyyāt*. The second grade is *ḥājiyyāt*, which comprises all activities and things, which are not vital to the preservation of the five principles, but are necessary to relieve or remove difficulties and impediments in life. The *taḥsīniyyāt*, on the other hand, are neither of the above, but exist only for the refinements of things.<sup>6</sup> One can note, however, that the concept of *maṣlaḥah* and the doctrine of *maqāṣid al-sharī'ah* are quite similar at the first glance. However, in a more detailed analysis, the two concepts actually complement and are interdependent between each other. *Maqāṣid al-Sharī'ah* relates to the

<sup>5</sup> Al-Ghazālī, *Al-Mustaṣfā*, 2:286.

<sup>6</sup> Mohammad Hashim Kamali, "Maqāṣid al-Sharī'ah" the Objectives of Islamic Law" In: *Islamic Studies*, vol. 38, no. 2 (Summer 1999), pp. 193-208, pp. 195-197. Abdullaah Jalil, "The Significances of Maṣlaḥah Concept and Doctrine of Maqāṣid (Objectives) in al-Sharī'ah" Project Evaluation", in: *The Journal of Muamalat and Islamic Finance Research (JMIFR)*, Vol. 3, No. 1, (2006), pp. 171-202, p.4. See also: *Ghazali's Definition of Maslahah*, at: ([http://www.bukisa.com/articles/452430\\_ghazalis-definition-of-maslahah#ixzz1xUc7Uu92](http://www.bukisa.com/articles/452430_ghazalis-definition-of-maslahah#ixzz1xUc7Uu92)).

protection of the human basic elements, while *maṣlaḥah* is the level of protection of these elements.<sup>7</sup>

As such, warding off harm (the subject of the fourth *qāʿidah*, i.e. *al-dararu yuzāl*) and removal of hardship (the subject of the third *qāʿidah*, i.e. *al-mashaqqatu tajlibu al-taysir*) are essential in achieving *maṣlaḥah*. As for warding off harm, it is portrayed as one of the major principles of *Sharīʿah* to which all legal determinations can be traced back. According to ʿIzzuddīn ibn ʿAbd al-Salām in *Qawāʿid al-Aḥkām Fī Maṣāliḥ al-Anām*, the whole law is intended to achieve both *jalbu al-maṣāliḥ* (attracting interests) and *darʿu al-mafāsīd* (eliminating harms).<sup>8</sup> Al-Shāṭibī (d. 790 / 1388) also states that “the basic purpose of the religious ordinances is to secure the welfare and public interest of human beings (*maṣlaḥah*) and to protect them against harm (*mafsadah*)”.<sup>9</sup> As for removal of hardship, it is integrated and connected to warding off harm. In this regard, al-Suyūṭī described the two principles as united.<sup>10</sup> Some contemporary writers considered the principle of warding off harm a subsidiary principle under the principle of removal of hardship.<sup>11</sup> Moreover, a reference to the definition of the second grade of *maṣlaḥah*, which is mentioned above (i.e. *ḥājīyyāt*) explains that removal of hardship is essential for their achievement. Furthermore, for any rulings based on *maṣlaḥah* to be valid, there are conditions to be observed. These conditions are: firstly, it must be *ḥaqīqīyyah* (genuine); secondly, it must be

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<sup>7</sup> Abdullaah Jalil, “The Significances of Maṣlaḥah Concept and Doctrine of Maqāṣid (Objectives) al-Sharīʿah, p.6.

<sup>8</sup> ʿIzzuddīn Ibn ʿAbd al-Salām, *Qawāʿid al-Aḥkām*, 1:12.

<sup>9</sup> Al-Shāṭibī, *al-Muwāfaqāt*, pp.2:6-7.

<sup>10</sup> Al-Suyūṭī, *al-Ashbāh wa al-Nazāʾir*, 84.

<sup>11</sup> Al-Rūgī, Muhammad, *Qawāʿid al-Fiqh*, 202.

*kulliyyah* (general), and lastly, it must not be in conflict with the *nuṣūṣ*. Imam Mālik ibn Anas, however, added two other conditions of *maṣlaḥah* as follows: it must be rational and acceptable to the people of sound intellect, and it must prevent or remove hardship from the people.<sup>12</sup>

As for *al-yaqīnu lā yazūlu bi-l-shakk* (the second *qāʿidah* above), certainty is not to be overruled by doubt is seen as a manifestation of the ease and mercy of the *Sharīʿah*, since this removes restrictions caused by extrinsic delusion and doubts experienced in many situations, especially in acts of ritual law, such as ablution, bathing and prayer.<sup>13</sup> This can go under the concept of removal of hardship.

On the other hand, giving custom (the subject of the fifth *qāʿidah*, i.e. *al-ʿādah muḥakkamah*) legal authority is seen within Muslim legal theory as a kind of *maṣlaḥah* and manifestation of the *Sharīʿah*'s flexibility and the validity of its application to all times and places. As customs are embedded in people and become part of their nature and culture, it is very difficult to require people to abandon them. Therefore, people are permitted to refer to their own customs and traditions provided that they do not contradict the teachings and principles of the *Sharīʿah*.<sup>14</sup>

Although there is apparently consensus among scholars with regard to these five *qawāʿid* being the most comprehensive principles, there were suggestions by some scholars to add other *qawāʿid* to these five. For

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<sup>12</sup> Roslina Che Soh and Nora Abdul Hak, "Application of *Maṣlaḥah* (interest) in Deciding the Right of *Ḥaḍānah* (Custody) of a Child: The Practice in the Syariah Court of Malaysia" in: *Journal of Applied Sciences Research*, Vol. 7, No. 13, (2011), pp. 2182-2188, p. 2183.

<sup>13</sup> Al-Sadlān, *al-Qawāʿid al-Kubrā*, 98. Shubayr, *al-Qawāʿid al-Kulliyyah*, 127.

<sup>14</sup> Al-Zarqā, *al-Madkhal*, pp. 2:869-870. Al-Sadlān, *al-Qawāʿid al-Kubrā*, 327. Kamāluddīn Jaʿīṭ, 'al-ʿUrf', in: *The Journal of International Islamic Fiqh Academy*, Fifth Issue, 1988, 10890.

example, ibn Nujaym in his *al-Ashbāh wal-Naẓāʾir* listed the *qāʿidah* that says: *Lā thawāba illā bil-niyyah* (no reward (in the afterlife) for the deeds without examining the intention behind them) among this group.<sup>15</sup> As stated in chapter two when commenting on *al-Ashbāh wal-Naẓāʾir* of ibn Nujaym, many scholars did not agree with him on this point, stating that this *qāʿidah* is obviously a subsidiary principle that comes under the first of the abovementioned five *qawāʿid*, i.e. *al-umūru bimaqāṣidihā*, because the latter is more comprehensive so as to include the reward of the deeds to be granted in the hereafter and the result of many worldly behaviors and criminal actions whose judgments vary, depending on the intention of the doer, while the candidate is concerned only with rewards of the hereafter.<sup>16</sup> Likewise, Muhammad Ṣidqī al-Būrnū in his *Mawsūʿat al-Qawāʿid al-Fiqhiyyah*, and Muhammad Shubayr in *al-Qawāʿid al-Kulliyah wa-l-Ḍawābiṭ al-Fiqhiyyah*, included within the universal *qawāʿid*, the *qāʿidah* which says: “*iʿmālu al-kalāmi awlā min ihmālih*” (a word should be construed as having some meaning, rather than disregarded), due to, according to them, its universal scope of application.<sup>17</sup> However, although this *qāʿidah* applies to many particulars, it is not similar to the five, because it is not of a remarkable presence in many chapters, such as chapters of *ʿibādāt* (ritual acts of worship), which comprise half of the *fiqh*. This is why both al-Suyūṭī and ibn Nujaym counted it, rather, among the *qawāʿid kulliyah*,<sup>18</sup> which will be discussed in the next chapter.

<sup>15</sup> Ibn Nujaym, *al-Ashbāh wal-Naẓāʾir*, 14.

<sup>16</sup> See the introductory section by Muṣṭafā al-Zarqā to his father’s book: *Sharḥ al-Qawāʿid al-Fiqhiyyah*, 40.

<sup>17</sup> Al-Būrnū, *Mawsūʿat al-Qawāʿid al-Fiqhiyyah*, 1:32. Shubayr, *al-Qawāʿid al-Kulliyah wal-Ḍawābiṭ al-Fiqhiyyah*, 89.

<sup>18</sup> Ibn Nujaym, *al-Ashbāh*, 4. Al-Suyūṭī, *al-Ashbāh*, 4.

Most likely the reason behind the rejection of adding an extra *qā'idah* to this group is that none, besides them, is similar to their extent of application. However, being universal as such does not mean that they encompass the whole of *fiqh*, so that the stray particulars which do not go under their content are not from the *fiqh*! Ibn al-Subkī in his *al-Ashbāh wal-Nazā'ir* criticized, in this context, the calls to reduce the whole *fiqh* into the five *qawā'id*, saying that this cannot be done without much *ta'assuf wa takalluf* (contortion and artificiality).<sup>19</sup> Nevertheless, al-Suyūṭī in *al-Ashbāh wal-Nazā'ir* quoted some scholars saying that being five in number is to make balance to the number of the pillars of Islam, which are also five.<sup>20</sup>

Muhammad al-Rūgī, in his *Nazariyyat al-Taq'id al-Fiqhī*, held the view that these *qawā'id* and the like<sup>21</sup> should not be considered *qawā'id fiqhiyyah*. Instead, they ought to be classified as *qawā'id shar'iyyah*, since they were derived from the general principles of the *Sharī'ah* which were taken from Qur'ānic verses and most authentic Prophetic traditions, belonging to the *mutawātir* (successive) type of reports, which represent certain knowledge. The role of the *fuqahā'* with respect to this kind of *qawā'id*, he added, was only to reveal them and form them in the form of maxims. According to him, the situation is different when it comes *al-qawā'id al-fiqhiyyah*, because they were mostly derived from single texts,

<sup>19</sup> Ibn al-Subkī, *al-Ashbāh*, 1:12.

<sup>20</sup> Al-Suyūṭī, *al-Ashbāh*, 8. See also: Wolfhart Heinrichs, "*Qawā'id as a Genre*", 372.

<sup>21</sup> His list includes some legal principles, amongst them three out of the five universal *qawā'id*, namely: 1. *Al-umūru bi-maqāsidihā*. 2. *Al-dararu yuzāl*. 3. *Al-mashaqqatu tajlibu al-taysir*. See: *Nazariyyat al-Taq'id al-Fiqhī*, 325.

which predominantly belong to the *āḥad* (solitary) type of Prophetic reports.<sup>22</sup>

However, this classification of *qawā'id* into *shar'iyyah* and *fiqhiyyah* is a kind of diversity of terms, because the prevailing stream considers the five *qawā'id* as the highest within the field, due to their wide scope of application, in addition to their function in expressing the *maqāṣid* which requires them, by nature, to be derived from the general principles and teachings of the *Shari'ah*.

Be that as it may, many works were written to treat these five *qawā'id* exclusively. Some treated all of them together, like that of Ṣāliḥ al-Sadlān, entitled *al-Qawā'id al-Fiqhiyyah al-Kubrā wamā Tafarra'a 'Anhā*, while some confined the discussion to one *qā'idah*, such as the two works of Ya'qūb al-Bāḥusayn, entitled *Qā'idat al-umūru bi-maqāṣidihā*, and *Qā'idat al-Yaqīnu Lā Yazūlu Bil-shak* respectively..

Now let us start exploring the five *qawā'id*.

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<sup>22</sup> Al-Rūgī, *Nazariyyat al-Ta'qūd*, pp. 325-330.

### 3.2. *AI-UMURU BI-MAQĀSIDIHĀ.*

(Matters are judged in light of the intention behind them).

#### 3.2.1. Introduction

This *qā'idah* concerns *niyyah* (intent), which is “a fundamental concept of the whole of Islamic religious law, be it concerned with worship or with law in the narrow sense”.<sup>23</sup> It influences the performance of all acts and duties,<sup>24</sup> since it is a component of almost every legal action, be it purification, prayer, fasting, sales, divorce, etc.<sup>25</sup>

*Niyyah* plays dual roles, moral and legal. The moral role is the actor's inner motive for his actions, based on which he may or may not gain *qabūl* (acceptance) of God for his actions, and consequently His rewards in the afterlife. The legal role, on the other hand, relates to the presence or absence of awareness of the individual when making any action. This results in discharging the actor from the duty if he does the action with awareness, and vice versa. It is also the crucial factor of the validity and invalidity of many contracts, and it specifies the proper punishment of many crimes, as it will be stated later on. The afterlife rewards are essential here as well, and they vary according to the ranks of the actions, which *niyyah* plays an active role in distinguishing.<sup>26</sup>

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<sup>23</sup> Schacht, *An Introduction*, 116.

<sup>24</sup> Abū Ḥāmid al-Ghazālī, *Iḥyā' 'Ulūm ad-Dīn*, (Samarang-Indonesia: Kiryatā Fūtrā, nd), 4:362.

<sup>25</sup> Paul R Powers, “Intent in Islamic Law, Motive and Meaning in Medieval Sunnī Fiqh”, in: *Ruud Peters and Bernard Weiss (ed): Studies in Islamic Law and Society*, (Leiden: Brill, 2006), 1.

<sup>26</sup> *Ibid.*, pp. 18-23.



The heart is the place of the *niyyah*, which is "the central organ of intellect and attention"; so, it is not required to be declared audibly.<sup>27</sup> It must, in this context, immediately precede the act.<sup>28</sup> However, there are different opinions with regard to the exact time in which one declares *niyyah* of fasting: whether it is before one goes to bed, or it should be immediately before dawn.<sup>29</sup>

### 3.2.2. Meaning of the *Qāʿidah*.

The *qāʿidah* implies that any action, whether it is done physically or verbally, should be judged in the light of the intentions of the doer. This means that the effect to be given to any particular action or transaction must be in accordance with the intention underlying such an action or transaction.<sup>30</sup>

The word "*al-umūr*" literarily means: "matters", which is inclusive of *al-aqwāl wa-l-aʿmāl* (deeds and utterances).<sup>31</sup> The word "*maqāṣid*" is the plural form of "*maqṣad*", which is one of the terms used in Arabic to refer to *niyyah* (intention). *Maqāṣid* in this context is used in the linguistic connotation and, thus, is different from the technical meaning of the legal term of *maqāṣid al-sharīʿah*. On the other hand, *niyyah*, lexically, is derived

<sup>27</sup> Al-Suyūṭī, *al-Ashbāh*, 30. Al-Sadlān, *al-Qawāʿid al-Kubrā*, 52. See also: Wensinck, A. J., "Niyya" in: *Encyclopaedia of Islam* second editionm Brill online, 2012, at: ([http://brillonline.nl/entries/encyclopaedia-of-islam-2/niyya-SIM\\_5935](http://brillonline.nl/entries/encyclopaedia-of-islam-2/niyya-SIM_5935)).

<sup>28</sup> Al-Suyūṭī, *al-Ashbāh*, 27.

<sup>29</sup> Ibid., 24.

<sup>30</sup> Al-Zarqā, *al-Madkhal*, 2:980. Al-Sadlān, *al-Qawāʿid*, 43. See also: Laldin, *A Mini Guide to Shariʿah*, 109.

<sup>31</sup> Al-Sadlān, *al-Qawāʿid*, 42.

from the root (*na-wa-ya*) which appears once in the *Qurʾān* in the word “*nawā*” in *Sūrat al-Anʿām* (6:96), meaning fruit or date pits. The root apparently conveys the connotation of seed, core or central element.<sup>32</sup> In the legal discourse, the term simply means to declare mentally to do an action. It was defined as “the aim to do something and proceed to do it”<sup>33</sup>, and as “the *ʿazm* (decision) of the heart to perform any act of worship to be closer to God”.<sup>34</sup> The latter definition does not actually reflect the essential nature of *niyyah*, since *niyyah* is more general to include aiming to do either of two types of actions; those which bring the person closer to God and those which are considered evil.

There are a variety of terms presented in the primary sources of Islamic law as equivalent of intent, which are used in the English-language sources dealing with law- such as *niyyah*, *qaṣd*, *ʿazm* and *irādah*; virtually all, convey the same meaning.<sup>35</sup> In this *qāʿidah*, the term *maqāṣid*, the plural form of *qaṣd*, is used. However, *niyyah* remains the most used term throughout law,<sup>36</sup> hence, it will be used as well in this treatment.

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<sup>32</sup> Powers, *Intent*, 29.

<sup>33</sup> Muhammad al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtj*, (Beirut: Dār al-Fikr, nd), 1:47.

<sup>34</sup> Ibn, Nujaym, *al-Ashbāh wal-Naẓāʾir*, 24.

<sup>35</sup> Powers, *Intent*, 3.

<sup>36</sup> Ibid. However, according to Ibn al-Qayyim in *Badāʾiʿ al-Fawāʾid*, although *niyyah* and *qaṣd* convey the same meaning, there are two differences between the two terms, namely: 1. *Qaṣd* may be connected to the action of the doer himself or the action of others, whereas *niyyah* is connected only to his own actions. It cannot be imagined that a man would intend the deed of another, but it may be imagined that he would want it. 2. *Qaṣd* can only refer to an action that the person is able to do and wants to do, whereas *niyyah* may refer to a person intending to do what he is able to do and what he is unable to do. See: Shubayr, *al-Qawāʾid al-Kulliyah*, 89.

### 3.2.3. Origins and History of the *Qā'idah*

The *qā'idah* originated in many traditions of the Prophet (PBUH), amongst which is the famous *ḥadīth*, which is the first in al-Bukhārī's (d.256 / 870) collection.<sup>37</sup> The *ḥadīth* says:

"Deeds (their correctness and rewards) depend upon intentions, and every person gets but what he has intended. So, whoever emigrated for Allah and His Messenger, his emigration is for Allah and His Messenger, and whoever emigrated for worldly benefits or for a woman to marry, his emigration is for what he emigrated for".<sup>38</sup>

According to many scholars, this *ḥadīth* is among the traditions upon which the whole spectrum of Islamic knowledge depends. Al-Suyūṭī said, in this regard:

"Know that there are plenty of reports from the imams which speak of the great importance of the *ḥadīth* about *niyyah* (intention). Abū 'Ubaydah said: There is nothing in the reports of the Prophet (peace and blessings of Allah be upon him) that is more comprehensive, rich in meaning or more useful than this. Imam ash-Shāfi'ī, Ahmad ibn Ḥanbal, ibn Mahdī, ibn al-Madīnī, Abū Dawūd, al-Dāraquṭnī and others were agreed that it is one-third of knowledge, and some of them said that it is one-quarter thereof. Al-Bayhaqī (d. 458 / 1066) based its being one-third of knowledge on the fact that a person earns reward by the actions of his heart, tongue and physical faculties, so *niyyah* is one of these three categories and the most important of them, because it may be an independent act of worship, and the others need it. ... Ash-Shāfi'ī said: It may be entered through seventy chapters"<sup>39</sup>

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<sup>37</sup> Al-Suyūṭī, *al-Ashbāh*, 8. Al-Zarqā, *Sharḥ al-Qawā'id*, 47. Shubayr, *al-Qawā'id al-Kulliyah*, 91.

<sup>38</sup> Al-Bukhārī, *al-Jāmi' al-Musnad al-Ṣaḥīḥ*, 1:30.

<sup>39</sup> Al-Suyūṭī, *al-Ashbāh wal-Nazā'ir*, 9. The translation of this quotation was taken from the website: (<http://islamqa.com/en/ref/70446>).

This may explain why many scholars started their collections of traditions with this *ḥadīth*, such as al-Bukhārī in his *al-Jāmiʿ al-Ṣaḥīḥ* and al-Nawawī, in three of his books, namely: *Riyāḍ al-Ṣāliḥīn*, *al-Arbaʿīn* and *al-Adhkār*.<sup>40</sup>

There is no mention of when, where, or who first formulated this *qāʿidah* in its final wordings. Perhaps the fame of the abovementioned *ḥadīth* from which it originated covered such a research point. However, it seems that scholars have used the *ḥadīth* per se to express the legal idea of the *qāʿidah* with slight modification. The word used in the *ḥadīth* is: (*aʿmāl*) which means: “deeds”, yet for more generality, jurists used the word (*umūr*), which means: “matters” instead to include both deeds and utterances. Al-Suyūṭī, however, mentioned that al-Qāḍī Ḥusayn al-Marrūdhī al-Shāfiʿī (d. 462 / 1069) reduced the whole Shāfiʿī *madhhab* to four principles, namely the five universal *qawāʿid* minus this *qāʿidah*, i.e. “*al-umūru bi-maqāṣidihā*. Al-Suyūṭī then said that *baʿḍ al-fuḍalāʾ* (a respectable figure) added this *qāʿidāh* to the list for the sake of balance: there are five pillars of Islam, and five universal *qawāʿid* of *fiqh*.<sup>41</sup> Al-Suyūṭī did not mention the name of this person or the time and place where he lived. Yet, we can easily figure out that it was formulated before his time (he died in 911 / 1505). In addition, al-Subkī (who died in 771 / 1370) has also discussed it in his *al-Ashbāḥ wal-Naẓāʾir*.<sup>42</sup> Yet still, no specific person has been reported to be the first who formulated it.

<sup>40</sup> Sheikh Faisal Abdur-Razak, *Actions are by Intentions*, (Toronto: Al-Attique Publishers Inc, 1999), 13.

<sup>41</sup> Al-Suyūṭī, *al-Ashbāḥ*, 8.

<sup>42</sup> Al-Subkī, *al-Ashbāḥ*, 22.

### 3.2.4. Rulings and Applications of the *Qā'idah*.

As mentioned above, intention serves dual functions: moral and legal, and it is a crucial element in both functions. As such, the moral function relates *niyyah* to *ikhlaṣ* (sincerity), which leads to God's pleasure. Accordingly, a matter, be it an action or an utterance, is accepted only if it is performed with proper intention, not on the basis of its outer appearance. It is valueless when it is done with ill-intention, even if it is good in nature and performed in complete accordance with the precepts of the law.<sup>43</sup> However, good *niyyah* does not change the nature of bad actions. Stealing, for example, is forbidden even if the intention was to give the stolen object or money as charity. Ill-intention, on the other hand, negates and invalidates a deed which is originally good. Hence, a man who goes out to perform *Jihād*, for example, just to be seen and described as brave, has engaged in a good deed with a bad intention; this bad intention would nullify his act, and may even cause him to be punished in the hereafter.<sup>44</sup> Al-Bukhārī narrated in his *al-Jāmi' al-Ṣaḥīḥ* that "A man came to the Prophet and asked: "A man fights for war booty; another fights for fame and a third fights for showing off; which of them fights in Allah's Cause?" The Prophet said, "He who fights that Allah's Word (i.e. Islam) should be superior, fights in Allah's Cause".<sup>45</sup> On another aspect, a person may not be held responsible for a prohibited action, which he has done unintentionally. Therefore, when a person, for example, breaks the fast during the day time of *Ramaḍān* by mistake, he is not to be blamed nor punished, although he, according to some schools of

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<sup>43</sup> Al-Ghazālī: *Iḥyā' 'Ulūm ad-Dīn*, 4:362. See also: Wensinck, A.J., "*Niyya*." in: *Encyclopaedia of Islam*.

<sup>44</sup> Abdur-Razak, *Actions are by Intentions*, pp.19-26.

<sup>45</sup> Al-Bukhārī, *al-Jāmi' al-Ṣaḥīḥ*, 1:58.

law, has to make up for that day.<sup>46</sup> Furthermore, good intention is taken into consideration even if the act is not carried out. Al-Bukhārī narrated that the Prophet said: "...If somebody intends to do a good deed and he does not do it, then Allah will write for him a full good deed (in his account with Him)..."<sup>47</sup>

The legal function of *niyyah*, on the other hand, varies according to different chapters of *fiqh*. In chapters classified as *fiqh al-ʿibādāt* (ritual law), such as purification, prayer, *zakāh*, fasting, pilgrimage, etc., *niyyah* is considered, generally, a fundamental component of any *ʿibādah*, without which it is not valid. However, because of the similarity in appearance between many types of worship and those of daily habits, and because *ʿibādāt* are of different ranks, *niyyah* makes the distinction between these various situations and statuses.<sup>48</sup> It distinguishes acts of worship from ordinary actions. For example, sitting in a mosque can be for resting, and it can be *iʿtikāf* (seclusion-and-devotion) as well.<sup>49</sup> *Ghusl* (bathing) can be for cooling off and/or cleaning up, yet it can also fulfill a commanded act of worship required after *janabah* (the state a man or a woman is in after sexual intercourse) or after the menstrual period finishes.<sup>50</sup> On another side, *niyyah* specifies a particular act from another similar in status, and to distinguish the standing and level of one act of worship from that of another.<sup>51</sup> For example, praying four *rakʿāt* in the afternoon can be for *ṣalāt al-ẓuhr* or *ṣalāt al-ʿaṣr* which are both obligatory. Moreover, praying two

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<sup>46</sup> Al-Ṣādiq al-Ghiryānī, *Mudawwanat al-Fiqh al-Mālikī wa Adillatuh*, First Edition, (Beirut: Muʾassasat ar-Rayyān, 2002), 1:634.

<sup>47</sup> Al-Bukhārī, *al-Jāmiʿ aṣ-Ṣaḥīḥ*, 5: 2380.

<sup>48</sup> Al-Suyūṭī, *al-Ashbāh*, 12. Ibn Nujaym, *al-Ashbāh*, 24. Al-Sadlan, *al-Qawāʿid al-Kubrā*, 52.

<sup>49</sup> Ibn Nujaym, *al-Ashbāh*, 24.

<sup>50</sup> Al-Suyūṭī, *al-Ashbāh*, 12. See also: Powers, *Intent*, 44.

<sup>51</sup> As-Suyūṭī, *al-Ashbāh*, 25.

*rakʿāt* just after the dawn can be for *ṣalāt al-ṣubḥ*, the obligatory prayer at that time, or it can be a supererogatory kind of prayer, which is not a substitute for *ṣubḥ* prayer. As stated above, the result of the differentiation of the *niyyah* is that the actor, in case of the obligatory duties, becomes free and discharged from performing the duty and the afterlife rewards appointed for the various actions would be recorded for him accordingly.

In the major part of *fiqh*, known as *fiqh al-muʿāmalāt* (law of transactions), a degree of consideration of *niyyah* as an essential component differs from chapter to chapter. In chapters demand the launching of a contract, such as chapters of *buyūʿ*<sup>c</sup> (sale), *ijārah* (rent), *nikāḥ* (marriage), etc., *niyyah* is of a high consideration before the involvement in the contract. The legal ruling of *nikāḥ*, for example, differs according to the *niyyah* of the person who intends to marry. If his *niyyah* is to abstain from committing adultery, as he knows he cannot control himself, *nikāḥ* is then obligatory. If he intends to marry a woman just because of her pedigree or because she is rich, it is then *makrūh* (detestable). If his *niyyah* is to harm the woman, *nikāḥ* is then forbidden.<sup>52</sup>

Scholars are not in agreement with regard to consideration of *niyyah* after launching a contract. While some tend to stress the externality of the contract without exploring the intent behind it, others are inclined towards the latter. Let us give an example for illustration. If a man marries a woman with the sole intention of sexual satisfaction, but he also intends a quick divorce to follow, the marriage is lawful according to some scholars and

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<sup>52</sup> Al-Ghiryāni, *Mudawwanat al-Fiqh*, 2:492.

invalid according to others.<sup>53</sup> The former group stresses the fulfilment of the legal requirements of the contract of marriage, such as the presence of the *waliyy* (guardian) of the woman, the witnesses, the *mahr* (marriage payment), etc., which are all fulfilled in this case. The other group, on the other hand, consider “the underlying intent, and maintain that distortion should be obstructed whenever this becomes known”.<sup>54</sup> Moreover, according to them, intending to divorce the woman from the beginning contradicts the main goal of legitimizing marriage in Islam, which is social stability and continuity, since marriage is meant to last a lifetime.

However, *niyyah* may not matter for many contracts in Islamic law, as contracts are essentially spoken acts, the key element of which is a verbal or written offer and a verbal or written acceptance of the offer. In *buyū*<sup>c</sup> (sale), for example, *niyyah* does not usually matter if the offer and acceptance were as explicit as to mean sale, the nature of which demands giving money in exchange for something.<sup>55</sup> So, when the seller says, for example: 'I sell this car to you', and the buyer replies saying: 'I buy it', their speech makes the contract binding. On the other hand, in case of expressions like: 'I consider this car yours', *niyyah* is required to know whether he meant he intended a sale or not for the contract to be binding.<sup>56</sup> However, duress invalidates contracts and gives *niyyah* an influential role. Intention also invalidates the contract in cases of selling things for illegal purposes. For example, selling

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<sup>53</sup> Kamali, *Shari'ah Law*, 48.

<sup>54</sup> Ibid.

<sup>55</sup> Ibn, Nujaym, *al-Ashbāh*, 18. See also: Powers, *Intent*, 98.

<sup>56</sup> Powers, *Intent*, 106.



grapes to a winemaker,<sup>57</sup> or selling a knife or a gun to someone, who intends to use it to commit a crime.

*Ṭalāq* (divorce) is binding if the husband pronounces it verbally using explicit words, such as: *anti ṭāliq* (you are divorced), regardless of his intention, that he was, for example, threatening his wife or was only in jest with her.<sup>58</sup> Illusive pronouncements of divorce are, on the other hand, binding if they are intended as such. So, the *niyyah* of the husband determines whether or not statements like: go to your family's house, you are free, etc., can have the same effect of the explicit words, making divorce binding.<sup>59</sup> *Niyyah*, according to some jurists, is also crucial in determining how many times of divorce apply when a husband pronounces certain utterances. As it is known, three pronouncements of divorce make it irrevocable, i.e. the couple cannot reconcile unless the wife marries another man and is then divorced by the new husband. For example, the word *battah*, which means cut, was used occasionally to mean divorce, yet it could mean one time or more, depending on the intention of the husband.<sup>60</sup> The *ḥadīth* known as *ḥadīth Rukānah* is usually cited in this context. The complete text of this *ḥadīth* is as follows: Abdullah ibn Yazīd ibn Rukanah reports from his father who reported from his grandfather saying, "I came to Allah's Messenger and said, "Oh Prophet of Allah! I pronounced *ṭalāq al-battah* to my wife". The prophet asked me, "What did you intend with that (*al-battah*)?". I said, "One (divorce)." The Prophet said, "By Allah (do you swear)?" I said, "By Allah (I swear)." The Prophet said, "Then it is according

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<sup>57</sup> Ibn, Nujaym, *al-Ashbāh*, 22.

<sup>58</sup> Ibn, Nujaym, *al-Ashbāh*, pp. 18-19. *Al-Mawsū'ah al-Fiqhiyyah*, 23.

<sup>59</sup> See: *Al-Mawsū'ah al-Fiqhiyyah*, pp.29: 26-27.

<sup>60</sup> *Al-Mawsū'ah al-Fiqhiyyah*, pp. pp. 8: 9-10.

to what you intend."<sup>61</sup> According to the Mālikīs and the Ḥanbalīs, pronouncing this word makes divorce irrevocable, whereas the Ḥanafīs considered it as one divorce. Al-Shāfiʿī, on the other hand, considered the intention in determining the number of divorces.<sup>62</sup>

*Niyyah* is a critical factor in assigning the proper punishment for homicide and bodily injuries.<sup>63</sup> It can be determined through different criteria, such as the instrument or weapon used for the crime, the physical and social context, etc.<sup>64</sup> Accordingly, homicide, for example, can be *ʿamd* (intentional), *shibh ʿamd* (quasi-intentional) or *khataʿ* (accidental). If the instrument is usually used to kill, and the situation was 'with malice aforethought', then the crime is categorized as *ʿamd*. If there is no intention to strike, or to kill, it is then *khataʿ*. The third category is when there is intention to strike but not to kill, which is to be determined through investigations. The punishment of intentional homicide is executing the murderer. It can be waived by the *waliyy* (guardian, father, son, etc.) of the murdered person in favour of *diyah* (blood money) from the murderer's own properties. In this case, the killer is required to make *kaffārah* (expiation), which is to free a slave, otherwise to fast two successive months. Unintentional homicide, on the other hand, requires the killer to make *kaffārah* and to pay *diyah*, which is by law a burden to be shared by the *ʿāqilah* (the male relatives from the father side). Quasi-intentional homicide also requires *kaffārah* and *diyah*. The amount of *diyah* required for all

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<sup>61</sup> Sulaymān ibn al-Ashʿat Abū Dawūd, *Sunan Abī Dawūd*, Ed. Muhammad Muhyiddīn ʿAbdul-Ḥamīd, (Beirut: Dār al-Fikr), 2:263.

<sup>62</sup> *Al-Mawsūʿah al-Fiqhiyyah*, pp. 8: 9-10.

<sup>63</sup> As-Suyūṭī, *al-Ashbāh*, 10.

<sup>64</sup> Ibn, Nujaym, *al-Ashbāh*, 20. See also: *al-Mawsūʿah al-Fiqhiyyah*, 42: 107.

categories is a hundred camels or equivalent, yet the camels in both intentional and quasi-intentional categories should cost much more than those required for unintentional homicide.<sup>65</sup>

According to Paul R. Powers in his *Intent in Islamic Law*, the term *niyyah* does not acquire its technical sense found in *fiqh* manuals from neither the *Qurʾān* nor the *Sunnah*, since, although it appears in some accepted *ḥadīths* (Prophetic traditions), it only conveys the general meaning of intention. However, one finds phrases in some verses and traditions that prove otherwise. In *Sūrat al-Māʾidah*, for example, the *Qurʾān* says: “O you who believe! When you intend to offer the prayer, wash your faces and your hands up to the elbows ...”. Moreover, the Prophet (PBUH) says, as narrated by al-Bukhārī: “If somebody intends to do a good deed and he does not do it, then Allah will write for him a full good deed (in his account with Him)...”<sup>66</sup>. Furthermore, in a tradition known to be *ḥadīth Rukānah*, which has already been mentioned, the Prophet asked Rukānah saying: “What did you intend when you said it, i.e. the word (*al-battah*)?”<sup>67</sup>. *Niyyah* technically means, as defined above, to aim or intend to do something, which is exactly what is meant in the verse and the traditions.

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<sup>65</sup> See the detailed legal rulings for homicide in: al-Ghiryānī, *Mudawwanat al-Fiqh*, pp. 4:472-502.

<sup>66</sup> Al-Bukhārī, *al-Jāmiʿ al-Sahīḥ*, 5: 2380.

<sup>67</sup> Abū Dawūd, *Sunan Abī Dawūd*, 2:263.

### 3.2.5. Subsidiary *Qawā'id*.

There are a number of subsidiary *qawā'id* derived from the *qā'idah* being studied, which serve it in a way that widens its scope of application. The following is a mention of three of them with examples for illustration.

1. "*Man ista'jala shay'an qabla awānihi 'ūqiba bi-ḥirmānih* (he who hastens the accomplishment of a thing before its due time is punished by being deprived thereof). So if a son kills his father, for example, intending to hasten getting his share from the heritage, he is punished by depriving him from having his share.<sup>68</sup>

2. "*Lā thawāba illā bi-niyyah*" (no afterlife rewards (for the deeds) without examining the intention behind them). This may reflect the religious moral aspect of *niyyah*, and is applicable to all chapters of *fiqh*, indicating that unless deeds are done with *ikhlaṣ* (sincerity), no afterlife rewards are to be gained.<sup>69</sup>

3. "*Al-ʿibratu fil-ʿuqūdi lil-maqāṣidi wal-maʿānī la lil-alfāẓi wal-mabānī*" (In contracts, effect is given to intention and meaning and not words and forms).<sup>70</sup> Illusive expressions, therefore, do not make contracts binding unless verified by the *niyyah*. These include indirect statements in *ṭalāq* (divorce), such as: you are free, you are alone, and so forth. This *qā'idah* is used also to differentiate between various types of contracts. For example, the contract for the use of a thing is called *ʿaqd ijārah* (contract of hire) if a remuneration is stipulated in consideration of such a use, and it is a contract

<sup>68</sup> As-Sadlān, *al-Qawā'id al-Kubrā*, pp.63-66.

<sup>69</sup> Ibn Nujaym, *al-Ashbāh*, pp. 14-21. As-Sadlān, *al-Qawā'id al-Kubrā*, pp. 69-71.

<sup>70</sup> As-Sadlān, *al-Qawā'id al-Kubrā*, pp. 68-69.

of loan if no such remuneration is stipulated.<sup>71</sup> So, "if two persons conclude a contract ostensibly of a loan but in consideration for which a specific rental is provided for, the contract would be regarded as a contract of hire as it is real meaning indicates, and not a contract of loan as the wording of the contract would suggest".<sup>72</sup>

### 3.3. *AL-YAQĪNU LĀ YAZŪLU BI-L-SHAKK*

(Certainty is not overruled by doubt).

#### 3.3.1. Introduction

*Al-yaqīn* (certainty) is one of the principles of Islamic creed and law. In creed, a careful reading of the *Qurʾān* reveals that *yaqīn* is a necessary requirement of belief.<sup>73</sup> It is a condition for the *shahādah* (i.e. testimony that there is no god save Allah and that Muhammad is messenger of Allah) to be counted and considered true, since the doubter is considered *munāfiq* (hypocrite).<sup>74</sup> The *Qurʾān* says, in this regard:

"Only those are the believers who have believed in Allah and His Messenger, and afterward doubt not, but strive with their wealth and their lives for the Cause of Allah. Those! They are the truthful".<sup>75</sup>

Moreover, it is narrated in *Ṣaḥīḥ Muslim* that the Prophet (PBUH) says:

" The servant meeting Allah having testified that there is no deity worthy of worship except Allah and that I

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<sup>71</sup> Maḥmaṣānī, *Falsafat at-Tashrīʿ Fil-Islām*, 161.

<sup>72</sup> Ibid.

<sup>73</sup> Kamali, *Sharīʿah Law*, 51.

<sup>74</sup> Ḥafīẓ Ḥakamī, *Maʿārij al-Qabūl*, (Riyadh: Dār Ibn al-Qayyim, 1995), pp. 418-420.

<sup>75</sup> *Sūrat al-Ḥujurāt*, (49): 15.

am the Messenger of Allah, not doubting them shall enter the *Jannah* (paradise)".<sup>76</sup> On the other hand, the *Qurʾān* encouraged Muslims to base their beliefs on truth and forbade them to adopt any idea, even if it is part of the religion itself, unless it is proved by reason through sound evidence.<sup>77</sup> The *Qurʾān* says: "And follow not that of which you have no knowledge"<sup>78</sup>. It also says: "Most of them follow not but conjecture. Certainly, conjecture can by no means take the place of truth"<sup>79</sup>. In response to this call, *mutakallimūn* (theologians) restricted the causes that lead to *al-ʿilm bi ḥaqāʾiq al-ashyāʾ* (knowledge of the realities) to three; namely: *al-ḥawās al-khams* (the five senses), *al-khabar al-ṣādiq* (true report) and *al-ʿaql* (the reason).<sup>80</sup> Accordingly, all elements of the creed are taken either from the *Qurʾān* or from the *mutawātir* (successive) type of Prophetic traditions. Majority of scholars held the view that *āḥād* (solitary) traditions are not the source of any of the creed elements, simply because they yield only *ẓann* (conjecture), which is not usually a way to the truth.<sup>81</sup>

<sup>76</sup> Muslim Ibn al-Ḥajjāj, *al-Ṣaḥīḥ*, the Book of *Īmān* (1) *ḥadīth* No. 41.

<sup>77</sup> Muhammad Saʿīd Ramaḍān al-Būṭī, *Kubrā al-Yaqīniyyāt al Kawniyyah*, (Damascus: Dār al-Fikr, 1993), 31.

<sup>78</sup> *Sūrat al-Isrāʾ*, 36

<sup>79</sup> *Sūrat Yūnus*, 36.

<sup>80</sup> Saʿd al-Dīn al-Taftāzānī, *Sharḥ al-ʿAqāʾid al-Nasafiyyah*, (Cairo: Maktabat al-Kulliyyāt al-Azhariyyah, 1987), 15. Abū Bakr Al-Bāqillānī, *Tamhīd al-Awāʾil*, Second Edition, (Beirut: Muʾassasat al-Kutub al-Thaqāfiyyah, 1987), pp. 28-30. However, for the purpose of finding out the truth in a scientific way, Muslim scholars in different knowledge disciplines established a comprehensive theory of knowledge. One of the major factors of their successful establishment of this theory was the adoption of the principle, which says: "*in kunta nāqillan fa-l-ṣiḥḥah aw muddaʿiyyan fa-l-dalīl*" (acceptability of reports requires proving their trueness, and of claims requires evidence). Therefore, certainty is always a crucial element in any research subject, be it a report, a claim, etc. In this context, to accept any report, focus would be on investigating the authenticity of the ascription to its source, since this ascription is what creates doubts and probabilities. If it is found related to its source through an authentic chain of narrators, its content would be considered and, consequently, a specific ruling would be given. Furthermore, in case of claims, investigations would focus on the proofs by which they are uncover whether the claim is true or false. See: Al-Būṭī, *Kubrā al-Yaqīniyyāt*, 31.

<sup>81</sup> Abū Zahrah, *Uṣūl al-Fiqh*, pp. 108-109.

In the law, legal rulings, in terms of the nature of their subjects and clarity and quality of the sources from which they are obtained, are either *qatʿiyyah* (definitive) or *ẓanniyyah* (speculative). The former are mainly those established by *nuṣūṣ* from the *Qurʾān* and / or from the *Sunnah* which are *qatʿiyyat al-thubūt* (are definitive by transmission) and *qatʿiyyat al-dilālah* (are definitive in indication). Their subjects are usually the fundamentals of the faith and the pillars on which it stands, the basic moral values of Islam, and its clear injunctions on *ḥalāl* and *ḥarām*.<sup>82</sup> The obligation of the five times daily prayers, the prohibition of *zinā* (adultery), and the share of a husband from the heritage of his deceased wife are clear examples of this kind. The speculative rulings, on the other hand, are those which are established from *nuṣūṣ* the nature of which is either *ẓannī al-thubūt* (are speculative by transmission) or *ẓannī al-dilālah* (are speculative in indication) or both. These include rulings such as whether *niyyah* is a condition for *ghusl* (washing of the whole body after sexual intercourse), whether one witness for a new moon is enough for the declaration of the beginning of *Ramaḍān*, whether the three days to be fasted as expiation for breaking an oath should be consecutive or separate days, and so forth.<sup>83</sup>

### 3.3.2. Meaning of the *Qāʿidah*.

The *qāʿidah* means that which is established with certainty is not removed by doubt. For example, if a person knew with certainty that he had made *wuḍūʿ* (ablution) but later he doubted about the continuity of his

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<sup>82</sup> Yūsuf al-Qaraḍāwī, *Min Ajli Ṣaḥwatin Rāshidah*, (Cairo: Dār al-Shurūq, 2001), pp.44-45. See also: Kamali, *Shariʿah Law*, 50.

<sup>76</sup> Kamali, *Shariʿah Law*, 50.

*wuḍūʿ*, certainty would prevail over doubt and, subsequently, his *wuḍūʿ* is still intact. The opposite situation is also true. So, if one was sure he did not make *wuḍūʿ*, yet later he thought he did, he must consider himself in a state of being without *wuḍūʿ*.<sup>84</sup> Al-Nawawī said expressing the idea of the *qāʿidah*:

"Things are legally assumed to remain as they are unless and until it is established with certainty that they are otherwise; and that extraneous doubts are of no consequence".<sup>85</sup>

### 3.3.3. Origins and History of the *Qāʿidah*.

The proof for this *qāʿidah* was based on *Qurʾānic* verses and Prophetic traditions. In *Sūrat Yūnus*, for example, the *Qurʾān* says: "Most of them follow not but conjecture. Certainly, conjecture can by no means take the place of truth". Ibn Jarīr al-Ṭabarī (d. 310 / 922) said in the exegesis of this verse: 'Doubt cannot by any means be substitute for certainty...'.<sup>86</sup> Muslim narrated in his *al-Ṣaḥīḥ*, that the Prophet (PBUH) said:

If one of you feels something in his stomach that makes him wonder if anything had passed from him, he should not leave the mosque until he either hears or smells something".

In another *ḥadīth*, the prophet (PBUH) said:

"If any of you was in doubt about his prayer and he did not know how much he had prayed, three or four *rakʿāt*, he should cast aside his doubt, and base his prayer on what he is sure of (i.e. three *rakʿāt*)".<sup>87</sup>

<sup>84</sup> Al-Suyūṭī, *al-Ashbāḥ*, 51.

<sup>85</sup> Yaḥyā ibn Sharaf al-Nawawī, , *Sharḥ Ṣaḥīḥ Muslim*, 4:49.

<sup>86</sup> Ibn Jarīr Al-Ṭabarī, *Jāmiʿ al-Bayān*, 11:82. See also: Al-Jazāʿirī, *al-Qawāʿid*, 273.

<sup>87</sup> Shubayr, *al-Qawāʿid al-Kullīyah*, 133.



Ibn ʿAbd al-Barr said in *al-Tamhīd* "None of the *fuqahā*<sup>88</sup> held a view about one who doubts about the number of *rakʿāt* he had already performed that he should cut short his prayer and repeat it in its entirety".<sup>88</sup>

Historically, this *qāʿidah* is among the first coined legal principles, which existed in early *fiqh* manuals, with some differences in wordings.<sup>89</sup> Al-Shāfiʿī, in this context, was quoted saying that "he who ascertained having ablution, yet he doubts he might have broken it, or vice versa, certainty is not overruled by doubt". Furthermore, it is the first principle in *Uṣūl al-Karkhī*, the collection of al-Karkhī al-Ḥanafī, which is the first existing written work on *qawāʿid al-fiqh*. Al-Karkhī says: "the norm is that what is established by certainty is not overruled by doubt".<sup>90</sup> In addition, al-Dabbūsī mentioned it in his *Taʿsīs al-Nazar*, saying: "the norm, according to Abū Ḥanīfah, is that whatever matter the knowledge of which is certain continues as such unless the reverse is definitely proved".<sup>91</sup> Perhaps the reason behind this early formation was the practicality of the issues in which certainties and doubts clash, which people experienced in their daily life, both in *ʿibādāt* (rituals) and *muʿāmalāt* (transactions).

### 3.3.4 Rulings and Applications of the *Qāʿidah*.

The *qāʿidah* is said to apply in almost every chapter of *fiqh*.<sup>92</sup> Al-Suyūṭī estimated that the particulars encompassed within its scope comprise

<sup>88</sup> Abū ʿUmar ibn ʿAbd al-Barr, *al-Tamhīd*, ed. Muṣṭafā al-ʿAlawī & Muhammad al-Bakrī, (Morocco: Wazārat al-Awqāf, 1387 A.H.), 5: 29.

<sup>89</sup> Shubayr, *al-Qawāʿid al-Kullīyah*, 132.

<sup>90</sup> Mughal, Munir Ahmad, *Islamic Legal Maxims*, 57.

<sup>91</sup> Shubayr, *al-Qawāʿid al-Kullīyah*, 132.

<sup>92</sup> Bakr Ismāʿīl, *al-Qawāʿid al-Fiqhiyyah*, 56.

three-fourths of all legal rulings.<sup>93</sup> The following are some examples from different chapters:

1. In the chapter of purity, one who is certain about their purification and then doubted it, is still pure. The reverse is also true; thus one who is certain about being in a state of ritual impurity, but then he doubted it, is still in the state of ritual impurity.<sup>94</sup>

2. In prayer, if one, while in prayer, was certain that he has completed two *rak'āt* (units) but was not certain whether he also completed the third *rak'ah* or not, he should take into consideration the lesser number and continue to pray as if he just prayed two, as this is what he is certain about.<sup>95</sup>

3. In fasting, if one doubted whether the sun had already set or not, one should not break the fast. In contrast, if he doubted about the dawn, he may continue eating and drinking. The certainty in the first case is the continuation of the daytime, whereas it is the continuation of the night in the second case.<sup>96</sup>

4. In *ḥajj*, if one doubted, while doing *ṭawāf* around the *Ka'bah*, how many times one has already performed, one should build upon certainty, i.e. the smaller number.<sup>97</sup>

5. In divorce, if a husband doubted how many times he pronounced divorce, whether once or twice, he considers the smaller number.<sup>98</sup>

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<sup>93</sup> Al-Suyūṭī, *al-Ashbāh*, 51.

<sup>94</sup> Ibn Nujam, *al-Ashbāh*, 62.

<sup>95</sup> Al-Sadlān, *al-Qawā'id al-Fiqhiyyah*, 104.

<sup>96</sup> Al-Suyūṭī, *al-Ashbāh*, 52. Ibn Nujaym, *al-Ashbāh*, 63. Al-Sadlān, *al-Qawā'id al-Kubrā*, 104.

<sup>97</sup> Al-Sadlān, *al-Qawā'id al-Kubrā*, 105.

<sup>98</sup> Al-Suyūṭī, *al-Ashbāh*, 56.

6. In transactions, if a person took a loan from someone else and was in doubt whether he is still in debt, he is still so until there is a proof which shows otherwise.<sup>99</sup>

However, *yaqīn* in the eyes of *fuqahā*<sup>2</sup> is more flexible and wider in connotation than that defined by the logicians, so much so it includes whatever is established by evidence, whether it is *qaṭʿī* (definite) or *ẓannī* (speculative).<sup>100</sup> Accordingly, a testimony of two or four witnesses on a particular case is legally reliable, and subsequently can be the base of the judge's sentence or verdict, although the mind allows that the reality may be otherwise, since this testimony is basically a kind of *āḥād* report that is prone to error and lying.<sup>101</sup> Moreover, *ghalabat al-ẓann* (strong or plausible conjecture), according to *fuqahā*<sup>2</sup>, can take the place of *yaqīn* when the latter is unattainable. This is because certainty is not always attained.<sup>102</sup> Therefore, if, for example, a sinking of a ship has been established, the death of those on board would be presumed on the basis of *ghalabat al-ẓann*.<sup>103</sup> Similarly, a sick person can break his fast if fasting, based on a strong conjecture of an honest physician, would increase his illness or delay his recovery. Equally, if a person performed his prayer in a remote place facing a direction which he thought, based on strong presumptions, is the most correct direction towards the *qiblah*, and he made his effort to reach this conclusion, his prayer would be valid even if he discovered later on that

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<sup>99</sup> Laldin, *A Mini Guide to Shariʿah*, 134.

<sup>100</sup> Al-Nadawī, *al-Qawāʿid*, 362.

<sup>101</sup> Maṣṣūr al-Bahūtī, *Kashshāf al-Qināʿ*<sup>2</sup>, ed. Hilāl Miṣīlhi, (Beirut: Dār al-Fikr, 1402 A.H.), 1:501. Al-Zuhaylī, *al-Qawāʿid al-Fiqhiyyah*, 1:96.

<sup>102</sup> Al-Nadwī, *al-Qawāʿid*, 362. Al-Sadlān, *al-Qawāʿid al-Kubrā*, 109. Al-Zuhaylī, *al-Qawāʿid*, 1:109.

<sup>103</sup> Maḥmaṣānī, *Falsafat al-Tashrīʿ*, 169.

it was not the correct direction. His prayer, on the contrary, is void if he just chose a direction randomly.<sup>104</sup>

Uncertainty, according to *fuqahā*,<sup>2</sup> also has a wider connotation to include the three categories of hesitation, i.e. *ẓann* (supposition) *shakk* (doubt) and *wahm* (delusion, fancy).<sup>105</sup> A balanced possibility in both directions is a state of *shakk*; an imbalance of possibility in either direction is a state of *ẓann*; while the less likely possibility is called *wahm*. None of these states is sufficient to prove the opposite of certainty, particularly if the fallacy is clear. Thus none would have legal consequence if cast on the certainty of any ascertained matter. In this regard, articles 72 and 74 of *Majallat al-Aḥkām* stipulate respectively that: *lā ʿibrata li-l-ẓanni al-bayyini khaṭaʿuhu* (No validity is attached to conjecture, which is obviously tainted by error) and, *lā ʿibrata li-l-tawahhum* (No weight is attached to fancy).<sup>106</sup>

### 3.3.5. Subsidiary *Qawāʿid*

There are many subsidiary *qawāʿid*, which were derived from this universal principle. Many of them, however, relate very strongly to the *uṣūlī* principle of *istiṣḥāb al-aṣl*,<sup>107</sup> i.e. "the continuation of the situation of a matter, whose existence or non-existence had been proven in the past, and is presumed to remain so for lack of evidence to establish any change".<sup>108</sup> They

<sup>104</sup> Al-Da<sup>cc</sup>ās, *al-Qawāʿid*, 25.

<sup>105</sup> Yahyā ibn Sharaf al-Nawawī, *al-Majmūʿ Sharḥ al-Muhadhdhab*, (Jeddah: Maṭbaʿat al-Irshād, nd), 1:168. See also: Al-Zuhaylī, Muhammad, *al-Qawāʿid al-Fiqhiyyah Waṭbiqātuhā*, 1:111.

<sup>106</sup> Maḥmaṣānī, *Falsafat at-Tashrīʿ*, 169.

<sup>107</sup> Kamali, *Principles*, 259.

<sup>108</sup> Kamali: *Sharīʿah Law*, pp. 145-146.

usually start with the word *al-aṣl* (the fundamental principle, the basic rule, the norm). Among them are the following.

1. *Al-aṣlu baqāʿu mā kāna ʿalā mā kān* (the basic rule is that a thing shall remain as it was originally). It is also expressed as: "*al-qadīm yutrak ʿalā qidamih*" (things shall be considered as they were). The *qāʿidah* "presumes the continued validity of the *status quo ante* until we know there is a change". So, what has been established in any particular time shall remain as it was unless the contrary is proved. For example, a missing person is presumed to be still alive, because this is the assured status before his disappearance. This certainty will still be considered until his death is proven by clear evidence. Therefore, any claim of his death will not validate the distribution of his wealth among the heirs, nor shall it allow his wife to marry another person, since the claim is a mere *shakk*, about an ascertained matter, and certainty is not to be overruled by doubt.<sup>109</sup> Similarly, if an individual has died and is recorded as being in debt as a certainty, then he would be regarded as remaining in debt.<sup>110</sup>

2. *Al-aṣlu barāʾatu al-dhimmah* (freedom of liability is a fundamental principle). For example, if A claims that B owes him a sum of money, B according to this *qāʿidah* is not responsible until proven so, since his *dhimmah* (legal responsibility) is not accountable unless it is proved otherwise.<sup>111</sup> This *qāʿidah* appears in the collection of al-Karkhī al-Ḥanafī as: *al-aṣl anna man sāʿadahu al-ẓāhir fal-qawlu qawluh, wal-bayyinah ʿalā man yaddaʿī khilāfa al-ẓāhir* (the basic rule is that the statement of a person

<sup>109</sup> Kamali, *Shariʿah Law*, 51. Al-Daʿcās, *al-Qawāʿid*, 17.

<sup>110</sup> Al-Zarqā, *al-Madkhal*, 2:981. See also: Izzi Dien, *Islamic Law*, 116.

<sup>111</sup> Al-Sadlān, *al-Qawāʿid al-Kubrā*, 122.

whose apparent state is that he is free from liability shall have preference, and evidence lies on him who claims against the apparent state).<sup>112</sup>

3. *Al-aşlu idāfatu al-ḥādithi li-aqrabi awqātih* (the fundamental principle is that any new event shall be regarded as happening at the time nearest to the present). So for a woman, who claimed that her husband had divorced her in his mortal sickness just to ban her from having a share of his heritage, while the other heirs claimed that the divorce took place when he was healthy; her claim is to have preference unless the other party have strong evidence to support their claim. That is because the two parties are in agreement that she was not his wife during the mortal sickness, which is a certainty; and the doubt occurred about her status before that. Certainty is to have prevalence.<sup>113</sup>

### 3.4. *AL-MASHAQQATU TAJLIBU AL-TAYSİR.*

(Hardship begets facility).

#### 3.4.1. Introduction

According to Muslim scholarship, *Sharī'ah* is designed to be distinctive by multiple characteristics in order to guarantee its stability, continuity and validity of application in all ages and places. Amongst these features is the principle of *raf' al-ḥaraj* (removal of hardship) which is integral to the general Islamic concept of *maşlahah*. Accordingly, although *Sharī'ah* comprises obligations (just like other legislative systems),

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<sup>112</sup> See: Mughal, *Islamic Legal Maxims*, 59.

<sup>113</sup> Al-Zarqā, *Sharḥ al-Qawā'id*, 77. Shubayr, *al-Qawā'id al-Kulliyyah*, 155.

generally speaking, no obligations of great or unusual strictness or difficulty are imposed within *Shari'ah*, nor is there any duty that is overly arduous.<sup>114</sup> On the contrary, through examining the injunctions of the *Shari'ah*, a clear tendency towards ease and facilitation may be realized.<sup>115</sup> In many occasions, the *Qur'ān* declares that Allah never intends to impose hardship on people; instead He intends to make things easy for them.

Furthermore, according to the *Qur'ān* and Prophetic traditions again, previous nations were subjected to excessively burdensome obligations, and Islam was to remove these burdens. For example, killing oneself was the requirement to repent from a sin according to the Torah. The *Qur'ān* says:

“And (remember) when Moses said to his people: ‘O my people! Verily, you have wronged yourselves by worshipping the calf. So turn in repentance to your Creator and kill yourselves, that will be better for you with your creator’”.<sup>116</sup>

Likewise, prayer was to be performed only in the synagogues, churches or temples. Furthermore, war booty was not lawfully to be distributed and consumed; instead it had to be burned. In contrast, the *Shari'ah* is viewed as making *tawbah* (repentance) a requirement from a Muslim giving up doing the sin immediately, regretting what has happened in the past, resolving not to go back to it and, in case he had wronged someone else, making amends to them or asking for their forgiveness.<sup>117</sup> Similarly, a Muslim can pray in any place when the prayer time is due, and the booty is to be distributed among the warriors. In this regard, al-Bukhārī narrated in his *al-Jāmi' al-Sahīh* that the Prophet (PBUH) said:

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<sup>114</sup> Al-Sadlān, *al-Qawā'id*, 219

<sup>115</sup> Al-Nadwī, *al-Qawā'id*, 302.

<sup>116</sup> *Sūrat al-Baqarah*, 54.

<sup>117</sup> Ibn Hajar, *Fath al-Bārī*, 1:101.

“I have been given five things which were not given to anyone else before me.... 1. Allah made me victorious by awe (by His frightening my enemies) for a distance of one month's journey. 2. The earth has been made for me (and for my followers) a place for praying and a thing to perform *tayammum*, therefore anyone of my followers can pray wherever the time of a prayer is due. 3. The booty has been made *ḥalāl* (lawful) for me yet it was not lawful for anyone else before me. 4. I have been given the right of intercession (on the Day of Resurrection). 5. Every Prophet used to be sent to his nation only but I have been sent to all mankind”.<sup>118</sup>

### 3.4.2. Meaning of the *Qāʿidah*.

The principle of *rafʿ al-ḥaraj* (removal of hardship) was reflected in law in this universal *qāʿidah* and its subsidiaries. It indicates that if any implementation of the law causes hardship to an individual, then there are alternatives one can do instead in order to overcome this hardship and difficulties.<sup>119</sup> Being derived from several *nuṣūṣ* from the *Qurʾān* and the *Sunnah*, the importance of this *qāʿidah* is found in its being the origin of all the *rukhaṣ* (concessions) that have been granted to people, who experience situations where they cannot perform the religious duties in their complete and original forms and shapes.<sup>120</sup> For example,<sup>121</sup> a traveler can shorten and combine his prayers and can also break his fast, due to the fact that travelling is a cause of difficulty that requires relief. A sick or disabled person could sit down and perform his prayers, if he found it difficult to stand. *Tayammum*, in this context, enables one to make ablution in the absence of water in order to perform acts of worship, such as prayers,

<sup>118</sup> Al-Bukhārī, *al-Ṣaḥīḥ*, Book 7, No. 331.

<sup>119</sup> Muḥammad Ṣidqī al-Būrnū, *al-Wajīz Fī ʾIdāḥ al-Qawāʿid al-Fiqhiyyah*, Fourth Edition, (Beirut: Muʾassasat al-Risālah, 1996), 218. Al-Nadwī, *al-Qawāʿid al-Fiqhiyyah*, 302. Laldin, *A Mini Guide to Shariʿah*, 118.

<sup>120</sup> Al-Suyūṭī, *al-Ashbāḥ*, 77. Ibn Nujaym, *al-Ashbāḥ*, 84.

<sup>121</sup> Al-Suyūṭī, *al-Ashbāḥ*, pp. 77-80.



circumambulation of the *ka'bah*, touching the *muṣḥaf*, etc.<sup>122</sup> It goes further than that when permission is given to do unlawful acts, where human life is at risk. Thus, drinking wine is permissible and may become obligatory when there is nothing to swallow if one is dying of choking. Likewise, a person can utter words of unbelief under the threat of death.<sup>123</sup>

*Mashaqqah* (hardship) was defined as “the difficulty that is unusual”.<sup>124</sup> Jurists have classified *mashaqqah* in terms of the person’s endurance into two categories, namely usual and unusual. The former refers to the hardship one may experience while performing the religious duties. This is not deemed significant in the eyes of the law, and subsequently requires no facilitation, because such hardship is unavoidable even in one’s daily life. So, the difficulties one finds in making *wuḍūʿ* or *ghusl* in cold weather, or one faces when getting up early for *ṣubḥ* (dawn) prayer, or when fasting during long and hot days; all of these and similar situations carry no weight by which an omission or reduction of the duty might be facilitated.<sup>125</sup> This is perhaps because this kind of hardship is within one’s strength and ability and leads to rewards in the afterlife, since the *taklīf* of obligations (i.e. their fulfillment) requires this kind of difficulty.<sup>126</sup> Unusual *mashaqqah*, on the other hand, is what is meant in the definition above, and is the subject of the *qāʿidah*.<sup>127</sup>

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<sup>122</sup> Al-Shāṭibī, *al-Muwāfaqāt*, 2:122.

<sup>123</sup> Al-Suyūṭī, *al-Ashbāh*, 84. Al-Nadawī, *al-Qawāʿid*, 308. Zaydān, *al-Wajīz*, 141.

<sup>124</sup> Al-Sadlān, *al-Qawāʿid al-Kubrā*, 219. Shubayr, *al-Qawāʿid*, 188.

<sup>125</sup> Al-Suyūṭī, *al-Ashbāh wa al-Nazāʾir*, 80.

<sup>126</sup> Al-Shāṭibī, *al-Muwāfaqāt*, 2:122.

<sup>127</sup> Al-Suyūṭī, *al-Ashbāh*, pp. 80-81

### 3.4.3. Origins and History of the *Qā'idah*.

This *qā'idah* has been originated from multiple *nuṣūṣ* from the *Qur'ān* and the *Sunnah*. We read in *Sūrat al-Nisā'* that: "Allah wishes to lighten (the burden) for you; and man was created weak".<sup>128</sup> We also read in *Sūrat al-Baqarah* "Allah intends for you ease and He does not want to make things difficult for you",<sup>129</sup> and in *Sūrat al-Mā'idah* that: "Allah does not want to place you in difficulty, but He wants to purify you".<sup>130</sup> In this regard, the Prophet (PBUH) said: "God did not send me to be harsh, or cause harm, but He has sent me to teach and make things easy".<sup>131</sup> Putting this into practice, <sup>ʿĀ</sup>ishah, the Prophet's (PBUH) wife, reported that "Whenever he, the Prophet, has a choice between two matters, he would choose the easiest, unless it is (a) sinful (act)".<sup>132</sup>

The legal idea of this *qā'idah* was known to many leading figures of Islamic law. Al-Sha<sup>ʿ</sup>bī (d.106 / 724), for example, reportedly said: "if you are to choose between two things then (choose) the easiest because it is nearer to the truth".<sup>133</sup> Al-Shāfi<sup>ʿ</sup>ī was also quoted saying: "*idhā dāqa al-amru ittasa<sup>ʿ</sup>a*" (an opening must be found when a matter becomes very difficult).<sup>134</sup> Yet, it is not known when, where and by whom the final wordings of the *qā'idah* were first established. Nevertheless, according to a story narrated by al-Suyūṭī and others, it was known as such in the fifth century, the time of Abū Sa<sup>ʿ</sup>īd al-Harawī, the narrator of the story. In case the story is correct, al-Qāḍī

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<sup>128</sup> *Sūrat al-Nisā'*, 28.

<sup>129</sup> *Sūrat al-Baqarah*, 185.

<sup>130</sup> *Sūrat al-Mā'idah*, 6.

<sup>131</sup> Muslim, *al-Ṣaḥīḥ*, Book 9, No. 3506.

<sup>132</sup> Al-Bukhārī, *al-Ṣaḥīḥ*, 7:101.

<sup>133</sup> Shubayr, *al-Qawā'id al-Kulliyah*, 195.

<sup>134</sup> Al-Zarkashī, *al-Manthūr fil-Qawā'id*, 1:120.

Ḥusayn al-Marrūdhī (d. 462 / 1069) is the one who first formulated it in its final wordings. It is noteworthy, in this respect, that neither the *qā'idah*, nor its legal idea is mentioned in *Uṣūl al-Karkhī*, the earliest collection of *Qawā'id*.

Historically speaking, the legal content of the *qā'idah* was one of the major criteria of employing *istihsān* (juristic preference), the principle that permits exceptions to strict *qiyās jaliy* (obvious legal analogy) in favour of *qiyās khafiy* (hidden legal analogy).<sup>135</sup> Muhammad Hashim Kamali mentioned in his *Principles of Islamic Jurisprudence* a number of examples to illustrate this. The following is one of the examples he mentioned. He said:

“It is a rule of the Islamic law of contract, including the contract of sale, that the object of contract must be clearly identified in detail. What is not specified in the contract, in other words, is not included therein. Now if we draw a direct analogy (i.e. *qiyās jali*) between sale and *waqf* - as both involve the transfer of ownership – we must conclude that the attached rights can only be included in the *waqf* if they are explicitly identified. It is, however, argued that such an analogy would lead to inequitable results: the *waqf* of cultivated lands, without its ancillary rights, would frustrate the basic purpose of *waqf*, which is to facilitate the use of the property for charitable purposes. To avoid hardship, a recourse to an alternative analogy, namely, to *qiyās khafi*, is therefore warranted. The hidden analogy in this case is to draw a parallel, not with the contract of sale, but with the contract of lease (*ijārah*). For both of these involve a transfer of usufruct (*intifā'*). Since usufruct is the essential purpose of *ijārah*, this contract is valid, on the authority of a *ḥadīth*, even without a clear reference to the usufruct. This alternative analogy with *ijārah* would enable us to say

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<sup>135</sup> Al-Bāḥusayn, *Qā'idat al-Mashaqqah Tajlib al-Taysir*, 318.

that *waqf* can be validly concluded even if it does not specify the attached rights to the property in detail”.<sup>136</sup>

#### 3.4.4 Rulings and Applications of the *Qāʿidah*.

Al-Suyūṭī and ibn Nujaym counted seven situations that can be the causes of *mashaqqah*. These include: 1. *al-safar* (travelling), 2. *al-maraḍ* (sickness), 3. *al-ikrāh* (compulsion), 4. *al-nisyān* (forgetfulness), 5. *al-jahl* (ignorance), 6. *ʿumūm al-balwā* (common affliction) and *naqṣ al-ahliyyah* (lack of legal competence).<sup>137</sup> Some contemporary writers added another factor, namely *al-khaṭaʾ* (error).<sup>138</sup> These situations, however, are not in the same level of *mashaqqah*; yet still they are causes of facility. On the other hand, they (al-Suyūṭī and ibn Nujaym) mentioned a variety of forms of facilities that are granted because of the mentioned situations, among them are the following. First, *isqāṭ* (omission), includes a woman’s discharge during her menstrual period from performing all kinds of prayer. Second, *tanqīṣ* (decrease), includes the shortening of the prayers while travelling. Third, *ibdāl* (replacement), includes, for example, the case of *tayammum*, which is the substitute of *wuḍūʾ* or *ghusl* in the absence of water. Fourth, *taqdīm* (advancing or bringing forward), such as perform *ʿaṣr* prayer earlier, i.e. in the time prescribed for *zuhr* because of sickness or rain. Fifth, *taʾkhīr* (postponement) can be seen in the case of allowing a sick person to postpone the compulsory fasting until he recovers. Sixth, *idṭirār* (necessity) means one is allowed to consume wine if he fears death from choking when no water is available. Seventh, *taghyīr* (change), can operate in, for example, the *ṣalāt*

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<sup>136</sup> Kamali, *Principles*, 225.

<sup>137</sup> Al-Suyūṭī, *al-Ashbāh*, pp. 77-80. Ibn Nujaym, *al-Ashbāh*, pp. 84-90.

<sup>138</sup> Shubayr, *al-Qawāʿid al-Kulliyah*, 205. Al-Rūgī, *Qawāʿid al-Fiqh al-Islāmī*, 199.

*al-khawf* (prayer of fear) which is a form of prayer different from the normal prayer, that is to be performed during battles.<sup>139</sup>

The legal idea of the *qā'idah* was used by many scholars, besides other criteria, to give preponderance to one of two incompatible pieces of evidence.<sup>140</sup> Within all schools of law, there were two approaches regarding choosing between the easier or the more difficult legal opinions in non-peremptory issues.<sup>141</sup> Some adopted the approach of choosing the easier opinion on account of *nuṣūṣ* from the Qur'ān and the *Sunnah*, some of which were cited above, in which scholars are instructed to make things easy for people and to issue their *fatāwā* accordingly.<sup>142</sup> Other scholars, on the other hand, adopted the reverse, citing, among others, a quotation ascribed to some companions saying that: "truth is heavy, while falsehood is light and infectious".<sup>143</sup> In this regard, although *rukhaṣ* (concessions) are legislated for some circumstances, individuals are encouraged to follow the original legal rulings in many situations. For example, it is better not to utter the words of unbelief even if one is under the threat of death, so if he is killed his rewards in the afterlife would be great, as he is considered a *shahīd* (martyr).<sup>144</sup>

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<sup>139</sup> Al-Suyūṭī, *al-Ashbāh*, 82. Ibn Nujaym, *al-Ashbāh*, 92.

<sup>140</sup> Al-Bāḥusayn, *Qā'idat al-Mashaqqah Tajlib al-Taysir*, 405.

<sup>141</sup> Badruddīn al-Zarkashī, *al-Baḥr al-Muḥīṭ*, First Edition, ed. Muhammad Tāmīr, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2000), 4:340.

<sup>142</sup> Ibid.

<sup>143</sup> Najmuddīn Al-Ṭūfī, *Sharḥ Mukhtaṣar al-Rawḍah*, Second Edition, ed. Abdullah al-Turkī, (Riyadh: Wazārat al-Shu'ūn al-Islāmiyyah, 1998), pp. 3:669-671. Al-Zarkashī, *al-Baḥr al-Muḥīṭ*, 4: 340.

<sup>144</sup> Abū Bakr ibn al-ʿArabī, *Aḥkām al-Qur'ān*, Third Edition, ed. Muhammad ʿAṭā, (Beirut: Dar al-Kutub al-ʿIlmiyyah, 2003), 3:162. Zaydān, *al-Wajīz Fī Uṣūl al-Fiqh*, 79.

### 3.4.5. Subsidiary *Qawā'id*.

Many legal principles were derived from this *qā'idah*, especially those, which relate to the concepts of *darurah* (necessity) and *hājah* (need). Amongst them are the following:<sup>145</sup>

1. *Al-darūrātu tubīhu al-maḥḍūrāt* (necessity makes the unlawful lawful).

This is a rewording of a Qur'ānic verse in *Sūrat al-Baqarah*, which says:

“But if one is forced by necessity, without willful disobedience, nor transgressing due limits,- then is he guiltless. For, Allah is Oft-forgiving and Most Merciful”.<sup>146</sup>

Therefore, the aim of this *qā'idah* is to deal with emergency situations when the normal rules of the law may lead to difficulty.<sup>147</sup> So, one is allowed to eat the meat of a dead animal, pig and the like, if one is likely to perish from hunger. However, certain conditions are to be met first, before applying this relaxation. These include the following;<sup>148</sup> first, necessity should be a present reality; second, the suffering person has found no lawful alternative; third, acting on necessity should not lead to a danger equal to or greater than the averted danger; and fourth, acting on necessity should not exceed the limits of precluding the danger, so when danger is no longer present, the relaxation comes to an end.

2. *Al-darūrātu tuqaddaru bi-qadarihā* (necessity is measured in accordance with its true proportions). Therefore, if one is allowed to drink wine to

<sup>145</sup> Al-Suyūṭī, *al-Ashbāh wal-Nazā'ir*, pp.84-85. Ibn Nujaym, *al-Ashbāh wal-Nazā'ir*, pp. 94-96. Shubayr, *al-Qawā'id*, pp. 213-228. Al-Da<sup>cc</sup>ās, pp. *Al-Qawā'id*, 42-45. Al-Sadlān, *al-Qawā'id*, pp. 245-298. It worth mentioning that al-Suyūṭī and Ibn Nujaym listed these *qawā'id* as subsidiaries under the other universal *qā'idah*, i.e. *al-dararu yuzāl*.

<sup>146</sup> *Sūrat al-Baqarah* (2): 173.

<sup>147</sup> Mohammad Hashim Kamali, “A Shari'ch Perspective on AIDS”, in: *Farid Esack and Sarah Chiddy, eds, Islam and AIDS: Between Scorn, Pity and Justice*, (2009) Oxford: Oneworld Publications, 81.

<sup>148</sup> Shubayr, *al-Qawā'id*, pp. 214-215. Kamali, *a Shari'ch Perspective on AIDS*, pp. 82-83

remove a blockage in one's throat, he should not exceed the amount that brings him relief. Likewise, a male physician is allowed to see only the affected part of the body of a female patient.<sup>149</sup>

3. *Al-idtirāru lā yubṭilu ḥaqqā al-ghayr* (necessity does not invalidate the rights of another). So although one is allowed to eat the food of another person because of starvation, he is to pay the cost of the food.<sup>150</sup>

4. *Idhā dāqa al-amru ittasa<sup>c</sup>* (an opening must be found when a matter becomes very difficult). For example, killing a violent thief is lawful, if it is perceived that a lesser threat or action is not likely to put a stop to his evil.<sup>151</sup>

### 3.5. *AL-DARARU YUZĀL*

(Harm must be eliminated)

#### 3.5.1 Introduction.

Eliminating harm is portrayed as one of the major principles of *Sharī<sup>c</sup>ah* to which all legal determinations can be traced back. According to °Izzuddīn ibn °Abd al-Salām in *Qawā'id al-Aḥkām Fī Maṣāliḥ al-Anām*, the whole law is intended to achieve both *jalbu al-maṣāliḥ* (attracting interests) and *dar'u al-mafāsīd* (eliminating harms).<sup>152</sup> Al-Shāṭibī (d. 790 / 1388) also states that “the basic purpose of the religious ordinances is to secure the welfare and public interest of human beings (*maṣlaḥah*) and to protect them

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<sup>149</sup> Al-Ḥarīrī, *al-Madkhal*, 105.

<sup>150</sup> Al-Sadlān, *al-Qawā'id*, 300.

<sup>151</sup> Kamali, *Sharī'ah Law*, 149.

<sup>152</sup> °Izzuddīn Ibn °Abd al-Salām, *Qawā'id al-Aḥkām*, 1:12.

against harm (*mafsadah*)”.<sup>153</sup> This formula has always been considered the criteria of legislating legal rulings for the new incidents and emerging issues.<sup>154</sup>

Being among the major factors of social, political and economic instability, harm has been given special treatments and various discussions in the Islamic legal discourse. In this context, jurists have developed in the course of history the theory of *nafy al-darar* (eliminating harm) based on multiple pieces of evidence from the *Qurʾān* and the *Sunnah* of the Prophet (PBUH), which declare clearly that causing harm to oneself or to others is prohibited.<sup>155</sup> Although each of the pieces of evidence is mentioned in the course of treating a specific issue, applicability of any verse or Prophetic tradition is based on the generality of its wording not on the specificity suggested by the occasion of its revelation, as the *uṣūlī* principle states.<sup>156</sup>

### 3.5.2. Meaning of the *Qāʿidah*

This *qāʿidah* is an essential principle within the theory of *nafy al-darar*, which aims to fight *darar* regardless of its nature, origin or cause. This includes preventing its occurrence, since protection is better than cure, and, in case it occurs, eliminating it by whatever means.<sup>157</sup>

*Darar* is defined as “a detriment caused to the interests of oneself or of others”.<sup>158</sup> Accordingly, to do an action that causes injury to oneself is

<sup>153</sup> Al-Shāṭibī, *al-Muwāfaqāt*, pp.2:6-7.

<sup>154</sup> Al-Sadlān, *al-Qawāʿid al-Fiqhiyyah*, 494.

<sup>155</sup> *Al-Mawsūʿah al-Fiqhiyyah*, 28:180. Shubayr, *al-Qawāʿid al-Kulliyyah*, 165.

<sup>156</sup> Al-Ghazālī, *al-Mustasfā*, 235.

<sup>157</sup> Ibrāhīm al-Ḥarīrī, *al-Qawāʿid al-Fiqhiyyah al-Kulliyyah*, First Edition, (Amman: Dār ʿAmmār, 1998), pp. 89-90.

<sup>158</sup> Al-Būrnū, *al-Wajīz*, 251. Al-Sadlān, *al-Qawāʿid al-Kubrā*, 497.



prohibited and must be removed. For example, if a sick person is informed by an expert physician that water would prolong the period of illness or may put him at risk of more severe sickness, using water will most probably bring him harm; thus he ought to do *tayammum* instead.<sup>159</sup> Likewise, causing harm to others is also prohibited and should always be eliminated. Therefore, opening a window in one's house, which violates the privacy of his neighbour's house is a harmful act that needs to be removed.<sup>160</sup> However, according to the Prophetic tradition from which this *qā'idah* has been derived, i.e. *lā ḍarar wa lā ḍirār*,<sup>161</sup> the injured neighbour should not reciprocate the harmful act of his neighbour by opening a window in his own house that similarly violates the first neighbour's privacy, because such an action is deemed to worsen the damage without providing any benefit in return. Instead, legal action and remedy are to be taken, and if matters are developed, paying compensation may also be due.<sup>162</sup>

### 3.5.3. Origins and History of the *Qā'idah*.

Besides the abovementioned *ḥadīth*, i.e. *lā ḍarar walā ḍirār*, the *qā'idah* is founded on the authority of a number of Qur'ānic verses, all of which state clearly that causing harm is prohibited.<sup>163</sup> Among them are the following:

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<sup>159</sup> Al-Ghiryānī, *Mudawwanat al-Fiqh al-Mālikī*, 1:221

<sup>160</sup> Kamali, *Shari'ah Law*, 145.

<sup>161</sup> Ibn Mājah, *I-Sunan*, 2:784.

<sup>162</sup> Al-Zuhaylī, *al-Qawā'id al-Fiqhiyyah*, 200. Al-Zarqā, *al-Madkhal al-Fiqhī*, 2:990. Kamali, *Shari'ah Law*, 145.

<sup>163</sup> Al-Būrnū, *al-Wajīz*, 252. Al-Sadlān, *al-Qawā'id al-Kubrā*, pp. 499-500. Shubayr, *al-Qawā'id al-Kulliyyah*, 166.

1. In a broad context, the *Qurʾān* says in *Sūrat al-Aʿrāf* (7):56 instructing people to be far away from doing mischief and to be good-doers:

“And do not do mischief on the earth after it has been set in order, and invoke Him with fear and hope. Surely, Allah’s Mercy is (ever) near unto the good-doers”.

2. In another respect, the *Qurʾān* threatened those who carry on doing harm. The *Qurʾān* says in *Sūrat Ṭaha* (20):111: “And who carried (a burden of) wrongdoing will indeed be a complete failure (on the Day of Judgement)”.

3. In *Sūrat al-Baqarah* the *Qurʾān* instructs men not to hurt women, if they want to take them back after they finish the term of the prescribed period after divorce. The *Qurʾān* says:

“And when you have divorced women and they have fulfilled the term of their prescribed period, either take them back on reasonable bases or set them free on reasonable bases. But do not take them back to hurt them, and whoever does that, then he has wronged himself...”<sup>164</sup>

4. In the context of the divorced women, the *Qurʾān* says:

“Lodge them (the divorced women) where you dwell, according to your means, and do not harm them as to straiten them (that they be obliged to leave your house). And if they are pregnant, then spend on them till they lay down their burden”.<sup>165</sup>

With regard to the formulation of the *qāʿidah*, based on extensive research, through searching electronic databases, I have looked through tens of *fiqhī* books from different schools of law, and this *qāʿidah* appears in its final wording in very few books. This may raise a question about the exact time in which it was coined as such. Many believe that the Prophetic *ḥadīth* that says: “*lā ḍarara walā ḍirār*” (let there be no infliction of harm nor its

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<sup>164</sup> *Sūrat al-Baqarah*, 231.

<sup>165</sup> *Sūrat al-Ṭalāq*, 6.

reciprocation) was the initial wordings of the principle of *al-ḍarar yuzāl*.<sup>166</sup> However, the *qā'idah* does not appear in its final wordings in either the early collections of *qawā'id*, or in the early sources of *fiqh*. In many places in *al-Mudawwanah* of Mālik and *al-Umm* of al-Shāfi'ī, the phrase "*li-'annahu lā ḍarara fīhi*" (because there is no harm in it) is used to justify the permissibility of doing an action.<sup>167</sup> This may prove that the legal conceptions of many *qawā'id* were known to leading figures of the *madhāhib* and to their disciples.

However, according to the story cited by al-Suyūṭī in *al-Ashbāh wa al-Naẓā'ir*, which I mentioned in the last section (see section 3.4.3), the *qā'idah* was known in its final wording in the fifth-eleventh and sixth-twelfth centuries—the time of Abū Sa'id al-Harawī who reported it. As I pointed out in the last section, if this story is correct, al-Qāḍī Ḥusayn al-Marrūdhī is then the one who first formulated it in its final wordings. However, different wordings were used in the books of *fiqh* and *qawā'id* for this *qā'idah*. For example, al-Sarakhsī (d. 490 / 1097) in *al-Mabsūṭ*, al-Ghazālī (d. 505 / 1111) in *al-Wasīṭ*, al-Kāsānī (d. 587 / 1191) in *Badā'ī' al-Ṣanā'ī'*, al-Zayla'ī (d. 713 / 1277) in *Tabyīn al-Ḥaqā'iq* use the phrase: '*al-aṣlu anna daf'ā al-ḍarar wājib* (protecting from and removing harm is an essential rule).<sup>168</sup> Moreover, al-Qarāfī (d. 684 / 1285) in *al-Furūq* use the phrase '*al-aṣlu fī-l-maḍārri al-taḥrīmu wa al-man'u* (the essential rule is that everything causes harm is

<sup>166</sup> Al-Sadlān, *al-Qawā'id al-Kubrā*, 493. Al-Da'ccās, *al-Qawā'id al-Fiqhiyyah*, 28. It worth mentioning that a number of contemporary writers adopt precisely the same words of the *ḥadīth* to be the universal *qā'idah* instead, as in the case of al-Burnū, *al-Wajīz* 251, al-Zarqā, al-Madkhal 2:989 and al-Sadlān, *al-Qawā'id al-Fiqhiyyah* 493.

<sup>167</sup> See for example these places in both books: *al-Mudawwanah* 4:182, 4:231, 5:459, and 7:179. *Al-Umm*, 1:43, 3:208, and 4:116,).

<sup>168</sup> *al-Mabsūṭ* 19:72, 14:129, 11:141, 11:94, Zayla'ī (d.713 Ī 1313) *Tabyīn al-Ḥaqā'iq* 6: 110. *Badā'ī' al-Ṣanā'ī'* 4:24, *al-Wasīṭ* 7:10

prohibited) instead.<sup>169</sup> What is interesting here is that ibn Nujaym, although the *qā'idah* appears in his *qawā'id* work *al-Ashbāh wal-Nazā'ir* several times in its final wordings, never used it as such in his *fiqhī* book entitled *al-Baḥr al-Rā'iq*. Instead, he used the phrase: '*al-aṣlu anna daf'ʿa al-ḍarari wājib*'.<sup>170</sup>

### 3.5.4. Rulings and Applications of the *Qā'idah*.

This *qā'idah* is mentioned in most books of *qawā'id* as one of the five universal legal principles. In this regard, many scholars have been quoted saying that it embodies half of the *fiqh*, since its subject is combating harm; one of the two major goals of the *Sharī'ah*, as stated earlier. For example, ibn al-Najjār said in his *Sharḥ al-Kawkab al-Munīr*: "it encompasses countless particulars, and it may embody half of the whole *fiqh*, since legal determinations are either to attract interests or to eliminate harms...".<sup>171</sup>

However, in spite of being one of the universal principles applicable to limitless particulars, books of *qawā'id* did not mention examples of this *qā'idah* being used in chapters of *fiqh al-ʿibādāt* (ritual law), which comprise nearly half of the whole *fiqh*. This matter makes the estimation that the *qā'idah* embodies half of *fiqh* questionable, since it does not, of course, apply to all of chapters of other major parts of the law, i.e. *fiqh al-muʿāmalāt* (law of transactions). In contrast, a reference to some *fiqh* manuals shows that it has been cited, in different phrases, in many occasions in chapters of *ʿibādāt*, such as *ṣalāh*, *zakāh*, *ṣiyām*, and *ḥajj*.

<sup>169</sup> Al-Qarāfī, *al-Furūq*, 1:380.

<sup>170</sup> *Al-Baḥr al-Rā'iq* 8:344, 8:232, 8:13.

<sup>171</sup> See: al-Nadwī, *al-Qawā'id* 287.

Be that as it may, *ḍarar* is of various types according to different considerations. First, it either affects one or more of *al-ḍarūriyyāt al-khams* (the five essential values) specified in *ʿilm maqāṣid al-sharīʿah*, namely: faith, life, intellect, property and lineage or affects a value with lesser importance.<sup>172</sup> In this case, priority is given to fighting *ḍarar* that threatens the safety of these five *ḍarūriyyāt*.<sup>173</sup> Priority is also observed among these five; so combating what threatens faith precedes what threatens life, and combating harm which affects life has priority over that which affects the intellect and so forth.<sup>174</sup> The traditional example for this is the legislation of *jihād*, for it might lead to the loss of one's life, yet it is tolerated, because it resulted in protecting the faith and continuity of the religion.<sup>175</sup> This may also explain why, according to some leading figures of Islamic law, the *ḥudūd* punishments are not to be implemented during *jihād* battles in order to maintain the faith of the perpetrator, for he may join the enemy forces to escape punishment.<sup>176</sup> Second, in terms of the role of the one who causes harm to others, *ḍarar* is either direct or indirect. The former is when a person causes *ḍarar* to others by himself, and is the actual performer of the act, while the latter is when a person does something that indirectly causes harm, such as digging a well in a public path, which then resulted in a person falling into it.<sup>177</sup> The performer of the direct *ḍarar* is legally responsible for whatever injuries his action causes, while in the indirect

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<sup>172</sup> Shubayr, *al-Qawāʿid al-Kulliyah*, 170.

<sup>173</sup> Kamali, *a Shariʿh Perspective on AIDS*, 77.

<sup>174</sup> Hammādī al-ʿUbaydī, *al-Shāṭibī wa-Maqāṣid al-Sharīʿah*, First Edition, (Beirut, Dār Qutaybah, 1992), 120. Yūsuf Ḥamid al-ʿĀlim, *al-Maqāṣid al-ʿAmmah lil- Sharīʿah*, Second Edition, (Riyadh: al-Dār al-ʿĀlamiyyah lil-Kitāb al-Islāmī, 1994), 189.

<sup>175</sup> Ibid.

<sup>176</sup> Ibn Qudāmāh, *al-Mughnī*, 13:173.

<sup>177</sup> Shubayr, *al-Qawāʿid al-Kulliyah*, 171.

*ḍarar*, the performer is responsible only if he did the action deliberately and intentionally.<sup>178</sup> Third, *ḍarar* is either material or moral.<sup>179</sup> While scholars are in agreement that a victim is entitled to full compensation for the material *ḍarar*, the vast majority of them have not given him the right to any kind of compensation for hurt feelings or for being insulted, dishonoured, or stigmatized.<sup>180</sup> Instead, it is the duty of the judge to determine the deterrent punishment the assailant deserves.<sup>181</sup>

However, in order to systemize the issue, certain conditions are to be observed to count an action as harmful to apply the legal procedures. First, it must be an actual harm that exists in the present or in the future, not a mere expectation of harm or a rare occurrence. Therefore, the claim of A, for example, that the wall, which his neighbour built to fence his, the neighbour's property, has blocked the airflow is not considered. Second, harm must be excessive. Thus, little harm is to be tolerated, as it cannot be avoided in most human actions. *ʿUrf* (custom), in this regard, must be referred to in order to determine whether harm is little or excessive. Third, it must be illegally committed; that is, it is to be the result of *taʿaddī* (aggression), *taʿassuf* (abuse) or *ihmāl* (negligence). Therefore, implementation of *qisās* (retribution), *ḥudūd* or *taʿzīr* punishments has the law's approval,<sup>182</sup> although they are harmful actions, for they are all

<sup>178</sup> Al-Ghiryānī, *Mudawwanat al-Fiqh*, 4:72-75.

<sup>179</sup> Shubayr, *al-Qawāʿid al-Kullīyyah*, 171.

<sup>180</sup> Muṣṭafā al-Zarqā, *al-Fīʿlu al-Ḍār wal-Ḍamānu Fīh*, (Damascus: Dār al-Qalam, nd), pp. 121-127. Ali al-Khafīf, *al-Ḍamān fī-l-Fiqh al-Islāmī*, (Beirut: Dār al-Fikr al-ʿArabī, 2000), pp. 45-59.

<sup>181</sup> Al-Khafīf, *al-Ḍamān*, 56.

<sup>182</sup> In Islamic law, *ḥudūd* usually refers to the punishments that are fixed for certain crimes that are considered to be "claims of God." They include theft, fornication, consumption of alcohol, false accusation of unlawful sexual intercourse and apostasy. *Taʿzīr*, on the other hand, is a sentence or punishment whose crime is not fixed by the law, and it is up to the judge to determine its rate. See: al-Ghiryānī, *Mudawwanat al-Fiqh*, 4:577 – 4:697.

intended to keep order and to achieve social stability. Fourth, the disruption must be to a legitimate interest or right. Accordingly, spilling wine owned by a Muslim is not a harmful action, since possession of wine is illegal. Equally, destruction of a building on stolen land is permitted for the real owner, and no compensation is to be made to the thief.<sup>183</sup>

### 3.5.5. Subsidiary *Qawā'id*.

Multiple considerations have been observed in the application of this *qā'idah*, each of which is coined in the form of a subsidiary *qā'idah*. The following are examples.

1. *Al-dararu lā yuzālu bimithlih* (a harm may not be eliminated by its equivalent). Therefore, it is not a legal excuse for someone to kill someone else on the ground that he was threatened to be killed if he did not kill him, since protecting the lives of others is of equal legal status to protecting one's own life.<sup>184</sup> Likewise, "if two people are equally in need of a certain medicine which is in the hands of one of them, the latter may not be deprived of it, in order merely to satisfy the need of the former, since doing so would mean eliminating one *darar* by its equivalent".<sup>185</sup>

2. *Al-dararu al-ashaddu yuzālu bi-l-darari al-akhaff* (a lesser *darar* is to be tolerated in order to eliminate a greater one). Thus, a person who is in a situation of severe hunger can eat from *maytah* (not slaughtered dead animal) to save his life. Equally, it is allowed to open the abdomen of a dead

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<sup>183</sup> Shubayr, *al-Qawā'id al-Kulliyah*, pp. 171-175. Al-Ḥarīrī, *al-Qawā'id al-Fiqhiyyah al-Kulliyah*, 90.

<sup>184</sup> *Al-Mawsū'ah al-Fiqhiyyah*, 28:181.

<sup>185</sup> Kamali, *A Shari'ah Perspective on AIDS*, 77.

pregnant woman to remove a foetus from her womb if his life was to be saved.<sup>186</sup>

3. *Yutaḥammalu al-dararu al-khāṣ li-dafʿi al-darari al-ʿām* (a private injury is tolerated in order to prevent a public injury). So, if a conflict arises between the interests of an individual or a group of individuals and those of the whole community, prevalence should be given to the latter.<sup>187</sup> For example, imposing fixed prices on goods when they are sold at high rates, although it may cause harm to traders, is meant to protect the whole community from their greediness.<sup>188</sup>

### 3.6. *AL-ʿĀDATU MUḤAKKAMAH.*

(Custom can be the basis of judgment).

#### 3.6.1. Introduction.

In almost every legal system, be it religious or secular, custom plays a significant role in the development of legal practice. This includes customs that antedate the emergence of the system, and those that emerge after its development.<sup>189</sup> In many societies, especially primitive communities, reliance upon custom is heavier, giving them full authority in order to guarantee sufficient stability for the group to survive, as they, according to their

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<sup>186</sup> Ibn Nujaym, *al-Ashbāh*, 97.

<sup>187</sup> Kamali, *A Shariʿh Perspective on AIDS*, 78.

<sup>188</sup> Ibn Nujaym, *al-Ashbāh*, 96.

<sup>189</sup> Khalil al-Mis, 'al-ʿUrf', in: *The Journal of International Islamic Fiqh Academy*, Fifth Issue, 1988, pp. 10844-45. ʿUmar al-Ashqar, , 'al-ʿUrf Bayna al-Nazariyyah Wal' Taṭbiq', in: *The Journal of International Islamic Fiqh Academy*, Fifth Issue, 1988, 11120. Gideon Libson, 'On the Development of Custom as a Source of Law in Islamic Law: Al-Rujūʿ Ilā al-ʿUrf Aḥadu al-Qawāʿid al-Khams al-Latī Yatabannā ʿAlayha al-Fiqhu', in: *Islamic Law and Society*, Vol. 4, No. 2 (BRILL: 1997), 132.



perspectives, regulate their individuals' behaviour and distinguish right from wrong.<sup>190</sup>

Islamic law is not an exception in this regard. Islamic legal theory granted custom a formal status, recognizing it as a legal principle of *Sharī'ah* and a valid basis of judicial decision.<sup>191</sup> Accordingly, a judge is authorized to base his verdict on custom in issues which are not regulated by a *naṣṣ* from the *Qur'ān* or the *Sunnah*.<sup>192</sup> Moreover, a significant number of *ahkām* which are based on *ijtihād* have been formulated according to the prevailing custom.<sup>193</sup> Furthermore, according to many scholars, knowledge of the different customs of the people is considered to be amongst the prerequisites of a jurist to be qualified for *ijtihād* and for *fatwā*.<sup>194</sup> However, although custom is not considered among the main sources of the law, it is referred to with great frequency in determining the suitable legal rulings in many situations.<sup>195</sup> Thus, it is of great subsidiary and supplementary value, operating within the framework of the main sources of the law.<sup>196</sup>

### 3.6.2. Meaning of the *Qā'idah*.

The *qā'idah* means that practices of people, be they actions or sayings – general or specific, of a certain group of people, can have authority in the

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<sup>190</sup> Al-Zarqā, Muṣṭafā, *al-Madkhal al-Fiqhī* 1:142. See also: Austin Cline, *Bonds of Tradition, Customs, and Habits from the Past, Traditional Authority*, at: ([http://atheism.about.com/od/religiousauthority/a/types\\_3.htm](http://atheism.about.com/od/religiousauthority/a/types_3.htm))

<sup>191</sup> Kamali, *Sharī'ah Law*, 54.

<sup>192</sup> Ibid., 149.

<sup>193</sup> Kamali, *Principles of Islamic Jurisprudence*, 249.

<sup>194</sup> Muhammad Amin ibn 'Abidīn, *Rasā'il Ibn 'Abidīn*, (Istanbul: Dār Sa'adat, nd), 2:125. Al-Wahbah Zuḥaylī, 'Subul al-Istifādah Min al-Nawāzil wal 'Amal al-Fiqhī fil-Taṭbīqāt al-Mu'āṣirah', in: *The Journal of International Islamic Fiqh Academy*, Eleventh Issue, 1998, 21550.

<sup>195</sup> Bakr Ismā'īl, *al-Qawā'id al-Fiqhiyyah*, 151.

<sup>196</sup> Zaydān, *al-Wajīz*, 254. Noel James Coulson, 'Muslim Custom and Case-Law', in: *Die Welt des Islams*, New Series, Vol. 6, Issue 1 Ĩ 2 (BRILL: 1959), 15.

absence of specific *nuṣūṣ*, or, in case of the presence of the *nuṣūṣ*, it can specify a general *naṣṣ* or restrict an unrestricted one. This has been seen as one of the means of the *Shariʿah* to solve the problems and find out the legal rulings of the new issues in the different societies.<sup>197</sup>

The terms *ʿurf* and *ʿādah* are Arabic terms which are normally both translated as custom. Scholars are not in total agreement whether the two terms are synonymous or have different connotations. According to some scholars, *ʿurf* is a collective practice of a large number of people, whereas *ʿādah* is for a repeated practice of an individual or of a group.<sup>198</sup> This view has been adopted by many, and is supported by legal applications of custom. However, *qawāʿid* manuals opted to employ the term *ʿādah* when expressing the *qāʿidah* under research. Occasionally, however, *ʿurf* is used instead of *ʿādah*, as in the case of *al-Bahjah fī Sharḥ al-Tuḥfah* by the Mālikī scholar Abū al-Ḥasan al-Tasūlī (d. 1258 / 1842).<sup>199</sup>

Accordingly, *ʿādah* is defined as “a recurring matter without a rational association”,<sup>200</sup> or “recurring practices which are acceptable to people of sound nature”.<sup>201</sup> *ʿUrf*, on the other hand, is defined as “the verbal or non verbal habitual practices of the majority of people within a community”.<sup>202</sup> *ʿĀdah*, as stated above, is the habits of an individual and can also be the

<sup>197</sup> Al-Sadlān, *al-Qawāʿid al-Fiqhiyyah*, 327.

<sup>198</sup> ʿĀdil Gūtah, *al-ʿUrf ʿInda al-Ḥanābilah*, First Edition, (Makkah: al-Maktabah al-Makkiyyah, 1997), 1:117. Al-Sadlān, *al-Qawāʿid al-Fiqhiyyah al-Kubrā*, 336. Kamali, *Principles of Islamic Jurisprudence*, 249.

<sup>199</sup> See: Abū al-Ḥasan al-Tasūlī, *al-Bahjah fī Sharḥ al-Tuḥfah*, First Edition, ed. Muhammad Shāhīn, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1998) 1:218.

<sup>200</sup> Al-Zarqā, *al-Madkhal al-Fiqhī al-ʿĀmm*, 2:871.

<sup>201</sup> Ibn Nujaym, *al-Ashbāh*, 101. Ibn ʿĀbidīn, *Rasāʾil Ibn ʿĀbidīn*, 2:114. Kamali, *Principles*, 248.

<sup>202</sup> Al-Zarqā, *al-Madkhal al-Fiqhī*, 2:840.

habits of a collective group.<sup>203</sup> In contrast, *ʿurf* is not used in the capacity of individual habits; so the personal habits of individuals are not referred to as their *ʿurf*.<sup>204</sup> However, since the term *ʿurf* is used predominately in books of *uṣūl* and *qawāʿid* as a legal principle, I will also use it exclusively in this treatment, unless the context is for individual habits, which demands using the term *ʿādah* instead.

It worth mentioning here that the concept of *ʿurf* is tied to the *Qurʾānic* concept of *maʿrūf*. *Maʿrūf* is an Islamic term meaning that which is commonly known, understood, recognized, acknowledged and accepted. *ʿUrf*, as stated above, is a custom which is well accepted by the collective conscience of a community and it is a trusted tradition. In Arabic, such habit or custom which widely accepted and respected is known as *maʿrūf*.<sup>205</sup> Both concepts are mentioned in the *Qurʾān*, although the latter is of a more frequent mention. *Maʿrūf* in the *Qurʾānic* usage is equated with good, and it is mainly in this sense that *ʿurf* and *maʿrūf* seem to have been used in the *Qurʾān*. However, both terms are interpreted as adherence to Allah's injunctions. The *Qurʾānic* frequent mentioned phrase "*taʾmurūna bī-l-maʿrūfi wa tanhawna ʿan al-munkar*" means: you enjoin belief in God and in His Messenger and enforce His laws, and you forbid disbelief and indulgence in the *ḥarām*. It is the same interpretation which is given to the term *ʿurf*. The *Qurʾān* says: "*khudhi-l-ʿafwa wa-ʾmur bī-l-ʿurfi wa-ʾaʿrid ʿani-l-jāhilīn*"<sup>206</sup> which means: keep to forgiveness, enjoin *urf* (fear of God and the observance of His commands and prohibitions) and turn away from the

<sup>203</sup> Ibid., 2:871.

<sup>204</sup> Kamali, *Principles of Islamic Jurisprudence*, 248. Al-Zarqā, *al-Madkhal al-Fiqhī*, 2:873.

<sup>205</sup> See: *The use of Maʿrūf in the Qurʾānic verses at:* (<http://islamicstudies.islammesssage.com/ResearchPaper.aspx?aid=679>).

<sup>206</sup> *Sūrat al-Aʿrāf*: 199.

ignorant. The interpretation of *ʿur* and *maʿrūf* as adherence to Allah's injunctions is based on Islam's perspective on good and evil which are, in principle, determined by divine revelation. Therefore, when Allah ordered the promotion of *maʿrūf*, He could not have meant the good which reason or custom decrees to be such, but what He enjoins.<sup>207</sup> This explains why *ʿurf* is considered as a source of law and a bases of judgment only if it does not contravene the principles of the *Sharīʿah*, as it will stated below.

### 3.6.3. Origins and History of the *Qāʿidah*.

Scholars referred to a number of *Qurʾānic* verses and Prophetic traditions as the basis for sanctioning *ʿurf*. The following are some of them.

1) In *Sūrat al-Māʿidah*, the *Qurʾān*, with reference to the types of expiation accepted when an oath is violated, says:

“Allah will not punish you for what is unintentional in your oaths, but He will punish you for your deliberate oaths; for its expiation feed ten poor persons on scale of the average of that with which you feed your own families or clothe them or manumit a slave ...”<sup>208</sup>

The phrase: (on scale of the average of that with which you feed your own families) is an instruction to consider the prevalent custom. Therefore, food which one is to feed the ten poor persons is to be the same as what people usually eat, be it rice, barley, wheat, corn, etc. In addition, custom intervenes also in determining the amount of food each of the poor is to be given. Both the type and amount of food are not specified in the verse, taking into

<sup>207</sup> Abū Jaʿfar al-Ṭabarī, *Tafsīr al-Ṭabarī*, (Beirut: Dār al-Maʿārif, n.d.), pp. 13: 327-333. Hashim Kamali, *Principles*, pp. 248-249.

<sup>208</sup> *Sūrat al-Māʿidah*, 89.

account the different situations of people in order to facilitate the matter for them.<sup>209</sup>

3). Al-Bukhrī narrated in his *al-Jāmi' al-Ṣaḥīḥ* on the authority of ʿĀʾishah, wife of the Prophet (PBUH) that:

“Hind, mother of Muʿāwiyah, said to Allah’s Messenger, “Abu Sufyan (her husband) is a miser. Am I allowed to take from his money secretly?” The Prophet (PBUH) said to her, “You and your sons may take what is sufficient reasonably and fairly”.<sup>210</sup>

The phrase ‘what is sufficient reasonably and fairly’ ‘*bil-maʿrūf*’ is a derivative of the term ‘*ʿurf*’. Accordingly, a wife whose husband is a miser can take from his money without his knowledge for the maintenance of herself and their children in accordance to what people in her social class spend for their maintenance.<sup>211</sup>

The theory of *ʿurf* was developed during the era of the formation of the four Sunni schools of law, when different sources of the law were identified. *ʿUrf* occupied a significant position in the four schools, although the Ḥanafīs and Mālikīs granted it more prominence than the Shāfiʿīs and Ḥanbalīs. Abū Ḥanīfah for example, was reported to have said that *ʿurf* is used to determine and interpret the intended meanings of the legal terms commonly used in a given society.<sup>212</sup> Muhammad bn al-Ḥasan al-Shaybānī, the disciple of Abū Ḥanīfah, mentioned in his *al-Siyar al-Kabīr* in this regard that “*ʿurf* is decisive” and that “evidence derived from custom is like

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<sup>209</sup> Al-Sadlān, *al-Qawāʿid*, 340.

<sup>210</sup> Al-Bukhārī, *al-Ṣaḥīḥ*, 3:413

<sup>211</sup> Ibid., 343.

<sup>212</sup> Laldin, Mohamad Akram, *Islamic Law and Custom: Historical Account From the Time of the Prophet Till Present*, at:

([http://www.isra.my/media centre/downloads.html?task=finish&cid=168&catid=5](http://www.isra.my/media%20centre/downloads.html?task=finish&cid=168&catid=5)).

that inferred from a *naṣṣ*".<sup>213</sup> In addition, *ʿurf* is also assimilated within the concept of *istiḥsān*; one of the sources of the law in the Ḥanafī school.<sup>214</sup> In Mālikī school of law, *ʿurf* is widely recognized from the very outset. The concept of *ʿamal ahl al-Madīnah*, an exclusive Mālikī source of law, referring mainly to the customary practice of the people of Medina who lived before the time of Mālik up to the time of the Prophet (PBUH), can be considered to be sufficient proof for the argument for the recognition of *ʿurf* and its position in the Mālikī school of law. The consideration of *ʿurf* is also included within *al-maṣlaḥah al-mursalah* (public interest), another source for the Mālikī school of law.<sup>215</sup>

However, similar to the previous universal *qawāʿid*, the first who formulated this *qāʿidah* is not known, too. Referring again to the story of al-Suyūṭī, in case it is correct, al-Qāḍī Ḥusayn al-Marrūdhī (d. 462 / 1069) is the one who first coined it in its final wordings.

### 3.6.4. Rulings and Applications of the *Qāʿidah*.

In almost every chapter of *fiqh*, *ʿurf* or *ʿādah* is employed in order to determine the legal rule for the individual's or society's practices. *ʿUrf* is generally of two types, namely *qawlī* (verbal) and *fiʿlī* (practical). The former refers to the agreement of people on the usage of a word or a group of words with a particular meaning, which may be different from its original

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<sup>213</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr lil' Shaybānī*, First Edition, ed. Muhammad Ḥasan al-Shāfiʿī, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1997), 1:120. See also: Laldin, *Islamic Law and Custom*, 9, citing Hamidullah, in *Muslim Conduct of State*, p.35, who was citing al-Shaybānī, *Sharḥ al-Siyar al-Kabīr*, vol.1, p. 194, vol.2, p.296, vol.4, pp. 16,23-5.

<sup>214</sup> Libson, Gideon, *On the Development of Custom*.

<sup>215</sup> Laldin, *Islamic Law and Custom*. Libson, *On the Development of Custom*, pp.134-135.

linguistic meaning.<sup>216</sup> It may even be different from the meaning intended in the *Qurʾān* or the *Sunnah*. The word *lahm* (meat), for example, is used in the *Qurʾān* to refer to all kinds of meat including fish,<sup>217</sup> whereas according to the customary usage of people, fish is not included. Likewise, the literal meaning and the *Qurʾānic* usage of the word *walad* is offspring, i.e. both sons and daughters,<sup>218</sup> yet people use it to refer to the male offspring exclusively.<sup>219</sup> Actual *ʿurf*, on the other hand, refers to the repeated practices, which have full acceptance among people of a community.<sup>220</sup> For example, dividing the payment of marriage dowry to the wife into two installments; one in the time of the contract, and the other deferred,<sup>221</sup> usually requested when a marriage comes to an end by divorce or death. Similarly, in many communities, the payment of the rent for a property occurs at the beginning of every solar rather than lunar month.<sup>222</sup>

*ʿUrf*, be it verbal or practical, is also either *ʿāmm* (universal) or *khāṣṣ* (local).<sup>223</sup> The universal *ʿurf* is that which is prevalent in all Muslim regions and all people are in agreement over it.<sup>224</sup> The classical example for this kind is what is known as *ʿaqd al-salam*.<sup>225</sup> This kind of contract was widely practiced in Medina when the Prophet (PBUH) emigrated there, and is still

<sup>216</sup> Al-Zarqā, *al-Madkhal*, 2:875.

<sup>217</sup> The *Qurʾān* says: “And it is He who has subjected the sea to you that you eat thereof fresh tender meat...”. *Sūrat al-Nḥl*, 14.

<sup>218</sup> The *Qurʾān* says: “Allah commands you as regards (*awlādikum*) your children’s (inheritance), to the male a portion equal to that of two females...” *Sūrat al-Nisāʾ*, 11.

<sup>219</sup> Ismāʿīl, *al-Qawāʿid al-Fiqhiyyah*, 458. Kamali, *Principles of Islamic Jurisprudence*, 253.

<sup>220</sup> See: Al-Zarqā, *al-Madkhal al-Fiqhī*, 2:876.

<sup>221</sup> Shubayr, *al-Qawāʿid al-Kulliyyah*, 241. Al-Zarqā, *al-Madkhal al-Fiqhī*, 2:877.

<sup>222</sup> Al-Zarqā, *al-Madkhal*, 2:869.

<sup>223</sup> Al-Būrnū, *al-Wajīz*, pp. 277-278. Shubayr, *al-Qawāʿid al-Kulliyyah*, pp. 241-242. See also: Mahdi Zahraa, “Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research”, in: *Arab Law Quarterly*, BRILL, Vol. 18, No. 314 (2003), 242.

<sup>224</sup> Al-Būrnū, *al-Wajīz*, 278.

<sup>225</sup> Kamali, *Principles*, 251. *ʿAqd al-salam* is a type of sale in which the price of the goods is paid at the time of the contract, whereas the delivery is postponed. See: al-Ghiryānī, *Mudawwanat al-Fiqh al-Mālikī*, 3:325.

practiced in the present day in almost all Muslim communities. It was retained from the pre-Islamic Arabian customs, and is considered to be an exception to the general rule prohibiting any contract where the commodity is absent at the time of the transaction.<sup>226</sup> Local *ʿurf*, on the other hand, is that which is common to a particular region or locality or is practiced amongst a particular society, profession or group of people.<sup>227</sup> For example, the *ʿurf* of Tajoura in Libya is that the cost of the celebratory feast after the birth of the first child should be borne by the maternal grandfather. Similarly, the *ʿurf* and common practice amongst traders is that the cost of delivery is upon the seller.

This *qāʿidah* operates within the legal theory in multiple respects, amongst them are the following:<sup>228</sup>

(1) First, on many occasions, *ʿurf* or *ʿādah* is the essential criterion of interpreting the *nuṣūṣ* from the *Qurʾān* or the *Sunnah*. It can qualify the *muṭlaq* (unrestricted) *naṣṣ* which is not interpreted either in law or linguistically. A good example here is the maintenance awarded to the divorced women whilst in her *ʿiddah* (waiting period). Hashim Kamali in his *Principles of Islamic Jurisprudence* mentions in this regard,

“The *Qurʾānic* commentators have referred to *ʿurf* in determining the precise amount of maintenance that a husband must provide for his wife. This is the subject of *Sūrat al-Ṭalāq* (65:7) which provides: ‘Let those who possess means pay according to their means’. In this *āyah*, the *Qurʾān* does not specify the exact amount of maintenance, which is to be determined by reference to custom.”<sup>229</sup>

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<sup>226</sup> Ibid.

<sup>227</sup> Shubayr, *al-Qawāʿid al-Kullīyyah*, 242. Al-Būrnū, *al-Wajīz*, 278. Al-Zarqā, *al-Madkhal al-Fiqhī*, 2:878.

<sup>228</sup> Al-Suyūṭī, *al-Ashbāh*, 98. Shubayr, *al-Qawāʿid al-Kullīyyah*, 244.

<sup>229</sup> Kamali, *Principles*, 250.



(2) Second, *ʿurf* can itself be a valid independent basis for many *aḥkām*, which have no explicit ruling from the Qurʾān and/or the *Sunnah*. According to al-Shawkānī (d. 1250 / 1834) *muḍārabah*<sup>230</sup> was legitimized based on *ʿurf*, and the Companions unanimously practiced it accordingly.<sup>231</sup>

(3) Third, *ʿurf* is the reference point used to identify the intended meaning of words that may otherwise have multiple linguistic connotations, removing confusion which may surround situations in order to give them the proper ruling. To give an example, the *ʿurf qawlī* (verbal custom) is, as stated above, the agreement of people on the usage of a word with a particular connotation. So the individual is bound to what words mean in this context, even if they are different from their original linguistic meaning. Therefore, if one took an oath that he will never eat *lahm*, he would not violate the oath by eating fish, since the word *lahm* does not include fish according to custom. Similarly, when someone declares that *walad* of so and so are the beneficiaries of his bequest, he means only the males, although *walad* in Arabic means both sons and daughters.<sup>232</sup> Needless to say here that the impact of *ʿurf* in these linguistic differences is not, of course, restricted to Arabic; instead it is equally deemed valid in all languages.<sup>233</sup>

What is worth mentioning here is that rulings are to reflect the *ʿurf* of a specific time and place. Therefore, if the *ʿurf* changes in the course of time, rulings which were based on it can also change. Moreover, any judgement,

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<sup>230</sup> *Muḍārabah* is a special kind of partnership where one partner gives money to another for investing it in a commercial enterprise. The investment comes from the first partner who is called “*rabbul-māl*”, while the management and work is an exclusive responsibility of the other, who is called “*muḍārib*”. It is also known as *qirād*. See: al-Ghiryānī, *Mudawwanat al-Fiqh al-Mālikī*, 3:545. The translation was borrowed from: (<http://www.islamicworld.net/economic/mudarabah/Mudarabah.html>).

<sup>231</sup> Muhammad al-Shawkānī, *Nayl al-Awtār*, (Cairo: Maṭbaʿat Muṣṭafā al-Ḥalabī), 5:365.

<sup>232</sup> Al-Burnū, *al-Wajīz*, 287. Kamali, *Principles of Islamic Jurisprudence*, 253.

<sup>233</sup> See: al-Suyūṭī, *al-Ashbāh*, 95.

which was based on a specific locality is to be implemented in that place, unless other localities have similar customs.<sup>234</sup> For this reason, jurists formed a legal principle expressing this matter, namely, “It is undeniable that rules of law vary with change in time (and place)”.<sup>235</sup>

Personal habits are also essential in determining the proper rule. For example, the number of the days of a woman’s menstrual period are fundamental in specifying the exact time she is allowed to pray, fast, recite the *Qurʾān*, etc, in case the blood does not stop at the usual time.<sup>236</sup> Likewise, fasting *yawm al-shakk*<sup>237</sup> is forbidden, unless one is used to fast day after day, for example, and his fasting coincides with *yawm al-shakk*.<sup>238</sup> Similarly, it depends on how often one used to give presents to a judge, for example, before the latter holds the position in order to count or not as a bribe.<sup>239</sup>

In order for *ʿurf* or *ʿādah* to be authoritative, there are a number of conditions that need to be met. The following are the most important.<sup>240</sup>

1) *ʿUrf* should not by any means contradict any *naṣṣ*, which is the definitive principle of the law. Therefore, if the *ʿurf* is to disinherit female heirs, for example, this *ʿurf* has no consequence, as it opposes the instructions of the *Qurʾān* and the *Sunnah*. However, if the *ʿurf* opposes a specific aspect of the *naṣṣ*, but not opposing it in its entirety, the application of *ʿurf* is suspended

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<sup>234</sup> Besim Hakim, ‘The *ʿUrf* and its Role in Diversifying the Architecture of Traditional Islamic Cities’, in: *Journal of Architectural and Planning Research*, (Chicago: Summer, 1994), 112.

<sup>235</sup> Al-Zarqā, *al-Madkhal*, 2:895.

<sup>236</sup> Shubayr, *al-Qawāʿid al-Kulliyyah*, 248.

<sup>237</sup> Fasting *Yawm al-shakk* is to fast the thirtieth of the month of *Shabān* on the account that it might be the first of *Ramaḍān*, when there is no official announcement of the beginning of *Ramaḍān*.

<sup>238</sup> See: Al-Suyūṭī, *al-Ashbāh*, 91.

<sup>239</sup> Ibid.

<sup>240</sup> Al-Zarqā, *al-Madkhal*, pp. 897-902. Shubayr, *al-Qawāʿid al-Kulliyyah*, pp.245-246. Kamali, *Principles*, pp. 251-252. Besim Hakim, *The ʿUrf and its Role*, 112.

only in the aspect that opposes the *naṣṣ*. Kamali mentioned a good example here. He said:

“The contract of *istiṣnāʿ*<sup>c</sup>, that is, the order for the manufacture of goods at an agreed price, may serve as an example here. According to a *ḥadīth*, ‘the Prophet (PBUH) prohibited the sale of non-existing objects but he permitted *salam* (i.e. advance sale in which the price is determined but delivery postponed)’. This *ḥadīth* is general in that it applies to all varieties of sale in which the object of sale is not present at the time of contract. *Salam* was exceptionally permitted as it was deemed to be of benefit to the people. The general prohibition in this *ḥadīth* would equally apply to *istiṣnāʿ*<sup>c</sup>, as in this case the object of sale is non-existent at the time of contract. But since *istiṣnāʿ*<sup>c</sup> was commonly practiced among people of all ages, the *fuqahāʾ*<sup>o</sup> have validated it on grounds of general custom. The conflict between *istiṣnāʿ*<sup>c</sup> and the ruling of the *ḥadīth* is not absolute, because the *ḥadīth* has explicitly validated *salam*. If realisation of benefit to the people was the main ground of the concession that has been granted in respect of *salam*, then *istiṣnāʿ*<sup>c</sup> presents a similar case. Consequently the custom concerning *istiṣnāʿ*<sup>c</sup> is allowed to operate as a limiting factor on the textual ruling of the *ḥadīth* in that the *ḥadīth* is qualified by the custom concerning *istiṣnāʿ*<sup>o</sup>.<sup>241</sup>

2) *ʿUrf* must be popular; i.e. followed by the majority in a community. In other words, it must represent a common and recurrent phenomenon. Therefore, practice of a few people is not authoritative, and cannot be a basis of a judgement.

3) *ʿUrf* must be in existence at the time of judgement or transaction. Therefore, customs of subsequent origin cannot be the basis of a judgement. This condition is particularly relevant to the interpretation of documents,

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<sup>241</sup> Kamali, *Principles*, pp. 251-252.

which are to be understood in light of the custom that prevailed at the time in which they were written.<sup>242</sup>

4) *ʿurf* must not break a clear stipulation of an agreement. For example, if the *ʿurf* is that the cost of a delivery of a good is upon the seller, but the two parties agreed that the buyer is to bear it; the latter cannot then consequently rely on *ʿurf* and ask for compensation. Similarly, if the *ʿurf* for the payment of rent of a property is at the beginning of the month, it is permitted for the parties to agree that it is paid at the end.

Contrary to the claim that *ʿurf* had not been granted formal status in Islamic law prior to the sixteenth century,<sup>243</sup> the usage and consideration of *ʿurf* dates back to as early as the lifetime of the Prophet (PBUH). This can be observed through the recognition and modification of multiple pre-Islamic Arab customs. For example, in criminal and evidence law, we find examples in the practice of *diyyah* (blood-money) itself, in addition to it being a shared burden on the *ʿāqilah*,<sup>244</sup> as well as the concept of *qasāmah*.<sup>245</sup> In family law, the Prophet (PBUH) counted *ḡihār*<sup>246</sup> as a valid type of divorce on the basis of *ʿurf*, although the position of *ḡihār* in Islamic law was later modified in the *Qurʾān* in *Sūrat al-Mujādilah*. In the area of commercial transactions, *bayʿ al-salam*, for example, was incorporated based on *ʿurf*.<sup>247</sup> Al-Bukhārī

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<sup>242</sup> Kamali, *Principles*, 251. See also: al-Sadlān, *al-Qawāʿid*, 358.

<sup>243</sup> See: G. Libson, F.H. Stewart, *ʿUrf, Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Brill, 2010. Libson, *On the Development of Custom*, pp.136-137.

<sup>244</sup> *ʿĀqilah* mainly refers to male relatives from the father’s side. See: al-Ghiryānī, *Mudawwanat al-Fiqh al-Mālikī*, 4:549.

<sup>245</sup> *Qasāmah* means, an oath is to be taken by fifty members of a tribe or a locality to refute accusations of homicide or to support their accusation of others being the murderers. See: al-Ghiryānī, *Mudawwanat al-Fiqh al-Mālikī*, 4:559.

<sup>246</sup> *ḡihār* is a special divorcing formula: when the husband says to his wife “you are to me like the back of my mother”. See: *al-Mawsūʿah al-Fiqhiyyah*, 28: 124.

<sup>247</sup> Laldin, Mohamad Akram, *Islamic Law and Custom*. (See also: Al-Sadlān, *al-Qawāʿid*, 345.

narrated, in this regard, that the Prophet (PBUH) came to Medina and the people used to pay in advance the price of fruits to be delivered within one or two years, and that the Prophet said, “Whoever pays money in advance for dates (to be delivered later) should pay it for known specified weight and measure (of the dates).<sup>248</sup> However, all the prevalent customs during the lifetime of the Prophet (PBUH) that gained his tacit approval subsequently became part of what is known as *sunnah taqrīriyyah*.<sup>249</sup>

The Companions of the Prophet (PBUH) also referred to, used and considered *ʿurf* as a legal principle. The *diyyah*, for example, used to be paid in the form of camels during the time of the Prophet (PBUH). The Caliph ʿUmar ibn al-Khaṭṭāb made a judgment that those who use gold in their transactions should pay in gold, and for those who use silver should pay in silver, and for those whose main wealth is camels the *diyyah* is to be taken in the form of camels. This emendation of the payment of the *diyyah* was apparently due to the new conditions and customs of the newly conquered regions.<sup>250</sup> The statements of al-Qāḍī Shurayḥ (d. 78 / 697), a famous judge during the time of ʿUmar supports the claim that *ʿurf* was recognized as a source of law during this early stage. Addressing the merchants of wool in Medina, he said: “*sunnatukum baynakum*” which means, the way and habits they used to practice in carrying out their business will be basis of any subsequent judgement to be taken in their regard.<sup>251</sup>

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<sup>248</sup> Al-Bukhārī, *al-Jāmiʿ al-Ṣaḥīḥ*, Book 35, 3:441.

<sup>249</sup> Kamali, *Principles*, 249.

<sup>250</sup> Laldin, *Islamic Law and Custom*.

<sup>251</sup> Al-Nadwī, *al-Qawāʿid*, 301, citing Badruddīn al-ʿAynī (d. 855) in *ʿUmdat al-Qārī Sharḥ Ṣaḥīḥ al-Bukhārī*, 12:16.

### 3.6.5. Subsidiary *Qawā'id*

Finally, the following is a list of some of the subsidiary *qawā'id*, which were derived from the *qā'idah* under research. They are all included in *Majallat al-Aḥkām al-ʿAdliyyah*.<sup>252</sup>

1. “*istiʿmālu al-nāsi ḥujjatun yajibu al-ʿamalu bihā*” (public usage is conclusive and action must be taken in accordance to).
2. “*al-mumtaniʿu ʿādatan ka-l-mumtaniʿ ḥaqīqatan*” (a thing that is customary regarded impossible is considered impossible in fact).
3. “*al-ḥaqīqatu tutraku bi-dilālati al-ʿadah*” (The original (real) meaning is to be abandoned in favour of that established by custom).
4. “*al-maʿrūfu ʿurfan kal-mashrūʿi shartan*” (A matter recognized by custom is regarded as if stipulated by agreement).
5. “*al-taʿyīnu bil-ʿurfi kal-taʿyīni bil-naṣṣ*” (A matter established by custom is like a matter established by a legal text).

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<sup>252</sup> See: al-Sadlān, *al-Qawā'id*, 390. Bakr Ismāʿīl, *al-Qawā'id*, pp. 154-161. Al-Daʿcās, *al-Qawā'id*, pp. 50-63. Al-Zarqā, *Sharḥ al-Qawā'id*, 223-241.

CHAPTER FOUR

THE MOST COMPREHENSIVE

*QAWĀ'ID* (II)

*AL-QAWĀ'ID AL-KULLIYYAH*

## CHAPTER FOUR

### THE MOST COMPREHENSIVE *QAWĀ'ID* (II)

#### *AL-QAWĀ'ID AL-KULLIYYAH*

##### 4.1. INTRODUCTION.

As mentioned in the previous chapter, *al-qawā'id al-fiqhiyyah* vary with regard to their scope of application over *fiqh* particulars. The most comprehensive and broadly based of all *qawā'id* are the five universal ones, which were the subject topic of chapter three. In this chapter, discussion will be on other *qawā'id*, which are applicable to many particulars from various chapters of law, yet they are of less comprehensiveness and scope of application than the previous category. These are *al-qawā'id al-kulliyah*.

Among many authors of classical *qawā'id* works, it seems that the two Shāfi'ī scholars al-Subkī and al-Suyūṭī and the Ḥanafī scholar ibn Nujaym were the only writers who devoted special sections in their books, all titled *al-Ashbāh wal-Nazā'ir*, to discuss this type of *qawā'id* exclusively. Al-Zaqqāq al-Mālikī also had a discussion on some of these *qawā'id* in his *al-Manhaj al-Muntakhab*, describing them as: the second part of *qawā'id*, where he listed only eleven, some of which are in the lists of al-Subkī, al-Suyūṭī and ibn Nujaym.<sup>1</sup>

Al-Subkī described this sort of *qawā'id* as '*al-qawā'id al-ʿāmmah*,<sup>2</sup> i.e. the general legal maxims. However, al-Suyūṭī and ibn Nujaym preferred to

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<sup>1</sup> See: al-Manjūr, *Sharḥ al-Manhaj al-Muntakhab*, pp. 468-509

<sup>2</sup> Al-Subkī, *al-Ashbāh wal-Nazā'ir*, 94.



describe them as *kulliyyāt*, that apply to limitless particulars<sup>3</sup>; yet ibn Nujaym widened this term to also include the five universal *qawā'id*.<sup>4</sup> Al-Subkī mentioned twenty six *qawā'id* under this title, while al-Suyūṭī mentioned forty and ibn Nujaym mentioned only nineteen, seventeen of which are in al-Suyūṭī's list. Perhaps these learned scholars only cited those that were unanimously agreed upon within the schools they belonged to. As mentioned in the second chapter, when presenting *al-Ashbāh wal-Nazā'ir* of ibn Nujaym, apparently, the disparity in the number of *qawā'id* included in the collections of al-Subkī and of al-Suyūṭī reflects the development within the Shāfi'ī school, in the process of formulation of the legal principles. On the other hand, the disparity of the collections of the two Shāfi'ī scholars, and that of the Ḥanafī ibn Nujaym may reflect different levels of considerations between the two schools of law at some particular points in history, concerning the importance of *qawā'id* in the field of *fiqh*. While the Ḥanafīs were the pioneers, who first formulated *qawā'id* as legal maxims, the contribution of the Shāfi'īs to the *qawā'id* literature seems to have been of a greater impact on the development of the discipline, although the Ḥanafī works in the later stage are more systematic and disciplined. However, these collections reflect a mature stage in the development of the discipline of *qawā'id al-fiqh* and the awareness of the schools of law about the importance of *qawā'id* in constructing the *fiqhī* thought. This is true with regard to all the four schools of law, although they differ in the way they present them, and the methodology each follows. It is worth mentioning that most of the *qawā'id* in *Majallat al-Aḥkām al-Adliyyah* belong to this

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<sup>3</sup> Al-Suyūṭī, *al-Ashbāh*, 101. Ibn Nujaym, *al-Ashbāh*, 14.

<sup>4</sup> Ibn Nujaym, *al-Ashbāh*, 14.

group. Furthermore, a number of these *qawā'id* is included in al-Karkhī's treatise, the earliest exclusive *qawā'id* collection.<sup>5</sup>

It seems that many of the *qawā'id* in the lists are not of comprehensive nature, and subsequently do not deserve to be described as *kulliyāt*, which come in the first lower rank under the five universal *qawā'id*. Perhaps the reason behind being deemed as such, is that every set of them, especially those in the *Majallah*, functions as one team which serve one legal idea or theory. One can clearly note that every five or six, or may be less or more in some cases, treat one single theme in different aspects.

This will lead us to the main target of this chapter, that is to show the contribution of these *qawā'id* individually and collectively in serving the *fiqh* and in the dynamic process of finding out the legal determination for the infinite issues. Therefore, the examination will be on selected *qawā'id* in various subjects. These will include the areas of speech interpretation, legal liability and the acquisition of evidence.

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<sup>5</sup> See, as examples, the *qawā'id* number 7, 9, 10, 29 and 34 in al-Karkhī's collection.

## 4.2. QAWĀ'ID OF SPEECH INTERPRETATION.

### 4.2.1. Introduction.

The speech of any individual is either vain or meaningful. According to the *Qur'ān*, among the essential characteristics of the believers is to turn away from *al-laghw* (vain, nonsense talk). We read in *Sūrat al-Mu'minūn*,

“Successful indeed are the believers. Those who offer their *ṣalah* (prayers) with all solemnity and full submissiveness. And those who turn away from *al-laghw* (dirty, false, evil vain talk, falsehood and all that Allah has forbidden”.<sup>6</sup>

Therefore, the speech of every sane *mukallaf* should be protected from neglect and annulment in order to result in legal effects.<sup>7</sup> The following *qawā'id* constitute the theory of speech interpretation in Islamic law. What is remarkable in this regard is that many of these *qawā'id* are also *qawā'id uṣūliyyah* used as criteria for explaining *al-khiṭāb al-shar'ī* (divine communication), as will be presented soon.

### 4.2.2. *I'c mālu al-Kalāmi Awlā Min Ihmālih*

“A word should be construed as having some meaning, rather than passed over in silence”.

This *qā'idah* is among the legal principles, which have received special care from most authors of *qawā'id* works. It is article number 60 in *Majallat al-Aḥkām al-Adliyyah*, and is in the collections of al-Subkī, al-

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<sup>6</sup> *Sūrat al-Mu'minūn*, 1-3.

<sup>7</sup> Maḥmūd Muṣṭafā Harmūsh, *al-Qā'idatu al-Kulliyyatu I'c mālu al-Kalāmi Awlā Min Ihmālihi Wa'atharuhā fil-'Uṣūl*, First Edition, (Beirut: al-Mu'assat al-Jāmi'iyyah lil-Dirāsāt wal-Nashr, 1987), 50. Al-Zarqā, *al-Madkhal*, 1010. Shubayr, *al-Qawā'id al-Kulliyyah*, 271.

Suyūṭī and ibn Nujaym.<sup>8</sup> It is also discussed in almost all books of *qawā'id* in different wordings, although it is referred to briefly in many of them.<sup>9</sup> On the other hand, it is cited in some books of *fiqh* to support or justify the legal rulings of multiple issues in different chapters, especially those of *fiqh al-mu'āmalāt* (law of civil transactions).<sup>10</sup> The *qā'idah* is also used by the scholars of *uṣūl al-fiqh* in many researches relate to the locutions of the Lawgiver,<sup>11</sup> using it as a criterion to support the approach that every single word in the *Qur'ān* and the *Sunnah* must have a meaning, although some might not yet be perceived.<sup>12</sup> Therefore, it is among the principles, which are counted among the *qawā'id fihiyyah* and *qawā'id uṣūliyyah* at the same time.

In the contemporary times, the *qā'idah* received attention from many scholars. It was, including its subsidiaries, the subject of a masters thesis in al-Imām Muhammad Bin Sa'ūd Islamic university in Riyadh, Saudi Arabia by Maḥmūd Muṣṭafā Harmūsh under the supervision of Professor Muhammad Ṣidqī al-Būrnū. The study is a comprehensive piece of work, where the author tried to tackle all the *fiqhī* and *uṣūlī* topics the *qā'idah* is involved in. It was published for the first time in Beirut in 1987. On the other hand, Professor Ṣidqī al-Būrnū and Professor Muhammad Shubayr listed this *qā'idah* in their works within the category of the universal

<sup>8</sup> See: al-Subkī, *al-Ashbāh*, 1:171. Al-Suyūṭī, *al-Ashbāh*, 128. Ibn Nujaym, *al-Ashbāh*, 150.

<sup>9</sup> See for example: Muhammad ibn 'Umar ibn al-Wakīl, *al-Ashbāh wal-Nazā'ir*, Second Edition, (Riyadh: Maktabat al-Rushd, 1997), 2:23. Al-Zarkashī, *al-Manthūr fil-Qawā'id*, 1:183. Abū Sa'īd al-Khādimī, *Manāfa' al-Daqā'iq Sharḥ Majāmi' al-Ḥaqā'iq*, (Istanbul: Dār al-Ṭibā'ah al-'Āmirah, 1308 A.H.), 312. Al-Zarqā, *al-Madkhal al-Fiqhī*, 1010. Shubayr, *al-Qawā'id al-Kulliyah*, 269.

<sup>10</sup> See: Muhammad Amīn ibn 'Ābidīn, *Radd al-Muḥtār 'Alā al-Dur al-Mukhtār*, (Beirut: Dār al-Fikr, 2000), 2:120. Abd al-Ḥamīd al-Shirwānī, *Hāshiyat al-Shirwān 'Alā Tuḥfat al-Muḥtāj*, (Beirut: Dār Iḥyā' al-Turāth al-'Arabī), 7:506. Sulaymān al-Jamal, *Hāshiyat al-Jamal 'Alā al-Manhaj*, (Beirut: Dār al-Fikr, nd), 3:631.

<sup>11</sup> Al-Būrnū, *al-Wajīz*, 315.

<sup>12</sup> Harmūsh, *al-Qā'idah al-Kulliyah*, pp. 302-304. Al-Būrnū, *al-Wajīz*, 315.

*qawā'id*, making them six instead of five. They based their argumentations on a fact that the *qā'idah* has a broad scope of application in many chapters of *fiqh*, in addition to its engagement in many of the *uṣūlī* topics.<sup>13</sup> However, both declared that one of the reasons which pushed them to adopt this position was the abovementioned academic work of Harmūsh.<sup>14</sup>

Although the *qā'idah* is important in the field of *uṣūl* and *fiqh*, and it is of a wide range of particulars, the jurists in the past did not count it among the universal principles. It is apparently because it is not a pure *qā'idah fiqhiyyah*. They seem to consider it as an essential *uṣūlī qā'idah* which has a strong involvement in *fiqh*. This may explain why it is little mentioned in the books of *fiqh*, although its legal idea is observed in many particulars. This, of course, does not contradict the fact that it was dealt with on a wide scale in the books of *qawā'id al-fiqh*, since the main concern of the scholars of this discipline are the principles under which many particulars that share common legal ideas can be gathered, regardless whether or not any of the principles has a kind of involvement in the researches of other fields. To prove this, one can clearly notice that there are many linguistic and logic rules among the *qawā'id* of *Majallat al-Aḥkām al-Adliyyah*,<sup>15</sup> yet since they have clear involvement in *fiqh*, they received such special consideration.

Now, the *qā'idah* means that if any particular meaning can be attributed to a word, it may not be passed over as devoid of meaning, in

<sup>13</sup> Al-Bürnū, *al-Wajīz*, 314. Shubayr, *al-Qawā'id al-Kullīyyah*, 269.

<sup>14</sup> Al-Bürnū, *al-Wajīz*, 314. Shubayr, *al-Qawā'id al-Kullīyyah*, 269.

<sup>15</sup> See as examples these three principles, 1. "When a thing becomes void, the thing contained in it also becomes void". 2. "Continuance is easier than commencement". 3. "The absolute is construed in its absolute sense, provided that there is no proof of a restricted meaning either in the explicit text or by implication".

order to result in a legal action.<sup>16</sup> To give some examples; if someone acknowledged that he owed someone else a sum of money, he is then considered as such, so much so he would be still indebted even if he retracted his acknowledgment, unless there was a strong piece of evidence that he is no longer as such.<sup>17</sup> Likewise, when a husband addressed his wife saying, ‘you are divorced, you are divorced’, it is considered to be two times of divorce rather than to be a mere substantiation of one divorce.<sup>18</sup> Similarly, if one made a bequest of a thousand Dinars to be given as charity after his demise, then he made another bequest of another thousand Dinars, the heirs are to deduct two thousand Dinars from the heritage before they can divide it among them. Therefore, their claim that the second bequest is just a confirmation of the first is not considered.<sup>19</sup> However, if there was evidence or strong presumption in the previous two cases and the like that the second was just a confirmation of the first, the legal determination would then be in accord with this situation.<sup>20</sup>

Some books of *qawā'id* mentioned interesting issues related to this *qā'idah* where the speech of the individual is directed to two things; one of them can be a subject of legal rulings and the other cannot.<sup>21</sup> The majority of jurists held the view that only the former is to be legally considered, and that the latter is as if it was not mentioned in the speech.<sup>22</sup> For example, if one made a bequest of a thousand Dinars to be given to two people, one of

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<sup>16</sup> Al-Zarqā, *al-Madkhal al-Fiqhī*, 2: 1010. Al-Da<sup>cc</sup>ās, *al-Qawā'id al-Fiqhiyyah*, 63. Al-Būrnū, *al-Wajīz*, 315.

<sup>17</sup> Al-Zarqā, *al-Madkhal al-Fiqhī*, 2: 1010.

<sup>18</sup> Al-Zarqā, *Sharḥ al-Qawā'id*, 316. Al-Zarqā, *al-Madkhal al-Fiqhī*, 2: 1010.

<sup>19</sup> Al-Nadwī, *al-Qawā'id al-Fiqhiyyah*, 393. Al-Ḥarīrī, *al-Madkhal Ilā al-Qawā'id*, 118.

<sup>20</sup> See: al-Zarqā, *al-Madkhal al-Fiqhī*, 2: 1010.

<sup>21</sup> Al-Suyūṭī, *al-Ashbāh*, 128. Ibn Nujaym, *al-Ashbāh*, 151.

<sup>22</sup> Harmūsh, *Qā'idat I'māl al-Kalām*, pp. 62-63.

whom is alive and the other is dead, the whole money would be given to the living person. Likewise, the money is to be given to the neighbour solely if the bequest is to a neighbour, and to the angel Gabriel. Similarly, one's wife would be divorced if one addressed her and a pet saying, 'one of you is divorced'.<sup>23</sup>

As stated earlier, this *qā'idah* has special engagement in many *uṣūlī* topics relate to the speeches of God and the Prophet (PBUH). According to many scholars, it indicates that none of the words in the *Qur'ān* and the *Sunnah* is derelict, that is passed out of use and therefore cannot give any meaning. Therefore, even the words at the beginning of some chapters in the *Qur'ān*, which are seemingly a mere combination of alphabetical letters do have meanings, whether they are perceived by people or not. For example, *sūrat al-Baqarah* starts with the word “*alif lām mīm*”, which are the alphabetical letters of A, L and M. Commentators are not sure about their precise meanings, nevertheless they are unanimously agreed that they must have meaning.<sup>24</sup> On the other hand, if the word in any *naṣṣ* has a juridical meaning besides its linguistic meaning, the former is usually given preference in case of conflict, since the *nuṣūṣ* are originally meant to result in legal actions.<sup>25</sup> For example, the Prophet (PBUH) once went back to his house (during the daytime) and asked his wife ʿĀ'ishah for something to eat. She replied that there was nothing. The Prophet (PBUH) then replied saying, “I am then *ṣā'im* (fasting)”. The word '*ṣā'im*' linguistically means to abstain from something, be it eating, talking, moving, etc. at any time, but in

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<sup>23</sup> See for more examples and for the different opinions of jurists: Harmūsh, *Qā'idat I'māl al-Kalām*, pp. 62- 68.

<sup>24</sup> Ibid., 303

<sup>25</sup> Ibid., pp. 337-338.

law it means to abstain from food, drink and sexual intercourse from dawn until sunset with the sincere intention to do so. Considering the linguistic meaning in this case, leads to no legal action, whereas considering the juridical meaning will result in the validity of fasting for the one who did not make intention to fast in the night prior to the day of the non-obligatory fasting, since the Prophet (PBUH) had decided to fast after it came to his knowledge that there was no food in the house.<sup>26</sup>

However, for a word to have a meaning, as the *qāʿidah* indicates, is governed by some considerations, each of which was presented in the form of a legal principle. They together construct the theory of speech interpretation and will be listed below as such, although they are considered as subsidiaries related to the abovementioned *qāʿidah*.

#### **4.2.3. *Al-Aṣlu Fī-l-Kalāmi al-Ḥaqīqah***

(In principles, words shall be construed according to their real meaning).

This *qāʿidah* is article number 12 in *Majallat al-Aḥkām al-ʿAdliyyah*. Aḥmad al-Zarqā, followed by his son Muṣṭafā, considered that it should be placed in the *Majallah* exactly after the previous one, i.e. it should be article number 61, since it, and the following two principles, constitute one legal idea that discusses speech interpretation.<sup>27</sup> Muṣṭafā al-Zarqā concluded from the original placement of this *qāʿidah* that the *qawāʿid* of the *Majallah* were listed randomly, i.e. they were not listed in categories, each of which serves a

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<sup>26</sup> Ibid., 340.

<sup>27</sup> Al-Zarqā, *Sharḥ al-Qawāʿid*, 139. Al-Zarqā, *al-Madkhal*, 2:978.



legal thought.<sup>28</sup> Apparently, the compilers of the *Majallah* listed it as such, following both al-Suyūṭī and ibn Nujaym who counted it as one of the subsidiary principles, which serve the universal *qā'idah* stating that certainty is not overruled by doubt.<sup>29</sup> This universal *qā'idah* is article number 3 in the *Majallah*, which was followed by ten subsidiaries, among them is the *qā'idah* under discussion. All the subsidiaries serve its legal content, which is that certainty must always be given priority if there was a clash between certainty and doubt over any matter. Accordingly, with regard to this *qā'idah*, if there was a conflict between the real meaning and the metaphorical meaning of a word, the priority should be given to the real meaning, since it is the original and most likely to be the intended meaning. However, although this approach seems to be strong, the *qā'idah* is closer to the context of speech interpretation, because, as Kamali said:

“Although relying on the literal meaning of a word is the norm and a requirement of certainty in the enforcement of a legal text, it may be necessary at times to depart from the literal in favour of adopting the metaphorical meaning of a word”,<sup>30</sup>

Therefore, it seems that the approach of Muṣṭafā al-Zarqā and others in listing this *qā'idah* within the framework of the speech interpretation is more felicitous.

Speech in Arabic, and perhaps in other languages, is divided into three categories in terms of the meaning it conveys; namely, *ḥaqīqī* (real), *majāzī* (metaphorical) and *muhmal* (derelict).<sup>31</sup> The *ḥaqīqī* meaning refers to the original and literal sense of the word, such as '*rajuʿ*' (man) for the male

<sup>28</sup> Al-Zarqā, *al-Madkhal*, 2:977.

<sup>29</sup> See: al-Suyūṭī, *al-Ashbāh*, 63. Ibn Nujaym, *al-Ashbāh*, 77.

<sup>30</sup> Kamali, *Principles*, 33.

<sup>31</sup> Maḥmaṣānī, *Falsafat al-Tashrīʿ Fil-Islām*, 162.

gender of the human being, and ‘*sayyārah*’ (car) for the vehicle used for transportation. The *majāzī* meaning is when the word is used in a secondary meaning rather than its original, but there should be a relationship between the two meanings. For example, the word ‘*asad*’ (lion) is used in Arabic to describe a brave man, and the word ‘*baḥr*’ (sea) to describe someone who is very knowledgeable and learned. The *muhmal* is when the word has passed out of use, and no longer gives a meaning.<sup>32</sup>

In law, the *ḥaqīqī* meaning is relied upon the most, and words should be construed according to their literal meaning.<sup>33</sup> So, if a person made a will that he bequeathed the sons of his neighbour the sum of ten thousand Dinars, and if the neighbour should have sons and grandsons at the time of the devisor’s death, the money will go exclusively to the sons of the neighbour. Thus, none of the grandsons is entitled to a single penny, because the literal meaning of the word ‘sons’ does not include the grandsons.<sup>34</sup> Likewise, if one swore that one would not do a particular work, one would not break the oath if they authorised someone else to do the work on behalf of him, since the original meaning of doing something is to be involved in it personally.<sup>35</sup>

The *ḥaqīqī* meaning in turn is sub-divided into three categories; namely *ḥaqīqah lughawyyah* (linguistic), *ḥaqīqah ʿurfīyyah* (customary) and *ḥaqīqah sharʿīyyah* (juridical).<sup>36</sup> In case of conflict, the majority of scholars held the view that the *ḥaqīqah sharʿīyyah* (which is when the word

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<sup>32</sup> Ibid.

<sup>33</sup> Kamali, *Principles*, 113.

<sup>34</sup> Al-Suyūṭī, *al-Ashbāh*, 63. Maḥmaṣānī, *Falsafat*, 162.

<sup>35</sup> Al-Su yūṭī, *al-Ashbāh*, 63.

<sup>36</sup> Shubayr, *al-Qawāʿid al-Kullīyyah*, 277. Kamali, *Principles*, 114.

is used for a juridical meaning that the Lawgiver has given to it in the first place)<sup>37</sup> should always have priority over the linguistic.<sup>38</sup> However, according to Harmūsh in his academic work (*Qā'idat I'cāl al-Kalām*), none of the scholars have discussed the cases where the juridical *ḥaqīqah* conflicts with the customary *ḥaqīqah*. Nevertheless, one example can illustrate the issue. There is a *ḥadīth* provided that if one eats the meat of camels, one should make *wuḍū'*. According to the Ḥanbalī scholars and others, *wuḍū'* here means the ablution required when one intends to make *ṣalah*, since this is the meaning of the word in the legal context.<sup>39</sup> Their argumentation was in response to other scholars, who held the view that *wuḍū'* here means the linguistic meaning, which is just to rinse the mouth and to wash the hands.<sup>40</sup>

On the other hand, the customary *ḥaqīqah* has in turn priority over the linguistic *ḥaqīqah*. For example, if one took an oath that he will never eat *lahm* (meat), he would not violate the oath by eating fish, since the word *lahm* does not include fish according to custom, although it is included in the original linguistic sense.<sup>41</sup>

#### 4.2.4. *Idhā Ta'adhdharat al-Ḥaqīqatu Yuṣāru Ilā al-Majāz.*

(When the real meaning cannot be applied, the metaphorical sense may be used).

This is the third principle in this legal context. It indicates that in case the original literal meaning of the word cannot be applied, and it has a

<sup>37</sup> Ibid.

<sup>38</sup> Al-Ghazālī, *al-Mustaṣfā*, pp. 189-190. See also: Harmūsh, *Qā'idat I'cāl al-Kalām*, 337.

<sup>39</sup> See: Najm al-Dīn al-Ṭūfī, *Sharḥ Mukhtaṣar al-Rawḍah*, Second Edition, ed. Abdullah al-Turkī, (Riyadh: Wazārat al-Shu'ūn al-Islāmiyyah, 1998), pp. 1:501-503.

<sup>40</sup> See: Shihbuddīn al-Qarfī, *al-Dhakhīrah*, First Edition, ed. Muhammad Ḥajjī, (Beirut: Dār al-Gharb al-Islāmī, 1994), 1:235.

<sup>41</sup> Al-Burnū, *al-Wajīz*, 287.

metaphorical sense, the latter can be used instead, in order to maintain the speech, and result in a legal effect.

The metaphorical meaning of the word is, as stated above, when the word is used in a secondary meaning rather than its original sense, provided that there is a relationship between the two meanings. For example, in Arabic, the word ‘*abb*’ (father) is used metaphorically to mean the grandfather and / or the uncle.<sup>42</sup> In the *Qurʾān*, we read,

“Or were you witness when death approached Ya<sup>c</sup>qūb (Jacob)? When he said unto his sons, ‘What will you worship after me?’ They said, ‘We shall worship your *Ilāh* (God – Allah) the *Ilāh* (God) of your fathers; Ibrāhīm (Abraham) Ismā<sup>c</sup>īl (Ishmael), Ishāq (Isaac), One *Ilāh* (God), and to Him we submit (in Islam)”.<sup>43</sup>

Ibrāhīm was not Ya<sup>c</sup>qūb’s father, nor was Ismā<sup>c</sup>īl. Ibrāhīm was his grandfather, and Ismā<sup>c</sup>īl was his uncle; nevertheless, the *Qurʾān* called them fathers metaphorically, following the Arabs’ style of speech, on the bases that grandfathers and uncles are respected in the same manner as fathers and can take charge of the children’s upbringing in the absence of the fathers. Therefore, if one made his father the beneficiary of his bequest, yet the father was dead in the time when he made the will, while the grandfather was then alive, the word father would be construed to mean grandfather metaphorically, because it is impossible to apply the real literal meaning. Therefore, the grandfather would be entitled under the will, and this interpretation would consummate the intention of the deviser. In another context, if one made an oath he will not eat from a particular amount of flour, he would violate the oath if he ate from bread made from

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<sup>42</sup> See: *Al-Mawsūʿah al-Fiqhiyyah*, 1:77.

<sup>43</sup> *Sūrat al-Baqarah* (2): 133.

that flour. This is because flour per se is not usually an eatable food stuff, so the oath should be directed to what is made from the flour, such as bread (and in our time this applies to biscuits, pizza, etc.), although the literal meaning of his speech is to eat from the flour itself.<sup>44</sup>

#### 4.2.5. *Idhā Taʿadhdhara Iʿmālu al-Kalāmi Yuhmal*

(If no meaning can be attached to a word it is disregarded altogether).

This *qāʿidah* is another further step in the field of speech interpretation. It means that if the word cannot be interpreted in either a literal or metaphorical meaning, it is then disregarded, and subsequently will have no legal effect.<sup>45</sup>

There are a number of factors that cause the speech to be disregarded. They are either linguistic, juridical or relate to logic and reason.<sup>46</sup> Linguistically, the homonym (which is one of a group of words that share the same spelling and the same pronunciation, but with different meanings)<sup>47</sup> can cause the word not to have legal effect according to some scholars. For example, if one's will is that he bequeathed his uncle a sum of a thousand Dinars, and it is known that the word 'uncle' in English refers to many people; so according to the Ḥanafīs, none of those who are referred to as uncle is entitled to the money, except if there was evidence that he meant one particular person. However, other schools held the view that all would

<sup>44</sup> See for other examples: al-Suyūtī, *al-Ashbāh wal-Nazāʾir* 128. Al-Zarqā, *Sharḥ al-Qawāʿid al-Fiqhiyyah*, 317. Al-Bürnū, *al-Wajīz*, pp. 319-320.

<sup>45</sup> Al-Bürnū, *al-Wajīz*, 322.

<sup>46</sup> Shubayr, *al-Qawāʿid al-Kulliyyah*, 221. Al-Bürnū, *al-Wajīz*, 321.

<sup>47</sup> The definition is taken from: (<http://en.wikipedia.org/wiki/Homonym>).

share the money rather than to all being deprived.<sup>48</sup> On the other hand, if one's vow is to drink wine or to fast on the first day of *Shawwāl* (the month that follows *Ramaḍān* according to the Islamic calendar), his speech is of no legal effect, and he is not to fulfil his vow, since both actions and the similar are considered sins, from which all people are to abstain in the first place.<sup>49</sup> As for what contradicts logic or reason is the claim of A, for example, that B is his father (in order to be entitled to inherit him or for any other purposes), while in reality B is younger than A, his speech is vain and he would not be entitled for any of what he dreamt of.<sup>50</sup>

#### 4.2.6. *Lā Yunsabu Ilā Sākitin Qawl.*

(No statement is imputed to a man who keeps silence).

This *qā'idah* is among the legal principles, which were known in their final wording from a very early stage. It was reported by many scholars that al-Shāfi'ī was the one who first formulated it in its existing wording.<sup>51</sup> Furthermore, it is also an *uṣūlī qā'idah* used in many researches of *uṣūl al-fiqh*, such as the types of the *Sunnah* and the *ijmā'*<sup>c</sup> (consensus).<sup>52</sup> It is worth mentioning that many scholars counted this *qā'idah* as one of the subsidiaries related to the universal *qā'idah* stating that certainty is not overruled by doubt.<sup>53</sup>

<sup>48</sup> See: Harmūsh, *Qā'idat I'māl al-Kalām*, 226.

<sup>49</sup> Ibid., pp. 236-240

<sup>50</sup> Shubayr, *al-Qawā'id al-Kulliyyah*, 281.

<sup>51</sup> Al-Suyūṭī, *al-Ashbāh wal-Nazā'ir*, 142.

<sup>52</sup> See as an example: Zaydān, *al-Wajīz fī Uṣūl al-Fiqh*, 184.

<sup>53</sup> Shubayr, *al-Qawā'id al-Kulliyyah*, 150.

The *qā'idah* indicates that it may not be said that a person who keeps silence has made such and such a statement. So, for example, one's presence and silence do not necessarily mean that he consents to the sale of his belongings, if someone else was selling them. Likewise, if one saw someone else damaging one's property and kept silent, his silence would not prevent him from compensation.<sup>54</sup>

However, due to many issues where silence may strongly reflect consent and admission, Ḥanafī jurists attached another sentence to the *qā'idah* in order to include them therein.<sup>55</sup> Hence, the new wording for the *qā'idah* is as follows. *Lā yunsab ilā sākitin qawlun, lākinna al-sukūta fī ma'riḍi al-ḥājati bayān* (No statement is imputed to a man who keeps silence, but silence is tantamount to a statement where there is a necessity for speech). The traditional example for this addition is that the silence of a virgin girl is considered sufficient consent to a marriage proposal. Likewise, the silence of a defendant before a judge may be deemed as endorsement that the court action initiated by the plaintiff is correct, which demands the judge to carry on other procedures to reach a fair judgement.<sup>56</sup> In this regard, the silence of the Prophet (PBUH) when he saw or heard an act or a saying from one or more of his companions is considered as part of his *Sunnah*. It is referred to as *al-Sunnah al-Taqrīriyyah*, and has the same authority as his verbal and actual *Sunnah*.<sup>57</sup>

<sup>54</sup> Al-Suyūṭī, *al-Ashbāh wal-Nazā'ir*, 142.

<sup>55</sup> Al-Nadwī, *al-Qawā'id al-Fiqhiyyah*, pp. 454-455.

<sup>56</sup> Al-Suyūṭī, *al-Ashbāh wal-Nazā'ir*, 142.

<sup>57</sup> Al-Shawkānī, *Irshād al-Fuḥūl*, 41. Wahbah al-Zuhaylī, *Uṣūl al-Fiqh al-Islāmī*, First Edition, (Damascus, Dār al-Fikr, 1986), 1:201.

#### 4.2.7. *Dhikru Mālā Yatajazzaʿu Kadhikri Kullih.*

(A reference to a part of an indivisible thing is regarded as a reference to the whole).

This is the final *qāʿidah* in this treatment. It has clear relevance to speech interpretation, because it is considered a reference to a part of a thing, which is not divisible. Hence, it represents reference to the whole, as a matter of fact, giving the speech some meaning rather than passing it over in silence. Therefore, divorce, for example, is valid and considered, if a husband made a reference to a part of his wife's body, saying for example, 'a half of you is divorced' or 'one of your limbs is divorced'. It is also valid and considered once if he divorced his wife a half or quarter divorce.<sup>58</sup> This is because divorce is indivisible. Similarly, if a person made their intention to perform pilgrimage, but he intended half a pilgrimage, what he intended is null and he ought to perform it completely, as pilgrimage is indivisible. On another context, if a father or a guardian of a homicide victim pardons part of the murderer for a fine, he will be completely saved from the prescribed penalty, i.e. the capital punishment,<sup>59</sup> as the latter is indivisible.<sup>60</sup>

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<sup>58</sup> According to Islamic family law, the husband has the right to divorce his wife, and not vice versa, although she can ask for divorce under certain conditions. The husband can divorce her twice, after each he can remarry her without need for a new contract. If he divorces her for the third time then she is not lawful unto him until she has married another husband. Then if the other husband divorces her, the first husband can remarry her, but with a new contract. See: *al-Qurʿān: Sūrat al-Baqarah*, 231-232.

<sup>59</sup> According to Islamic criminal law, the death penalty is imposed on the murderer. This is called *qiṣās*. It cannot be altered or cancelled after the offender has been found guilty based on sufficient evidence, unless, the family of the victim has pardoned him or asked for compensation (*diyyah*) instead of *qiṣās* punishment. See: Muhammad Abū Zahrah, *al-Jarimah wa al-ʿUqubah fī al-Fiqh al-Islāmī*, (Cairo: Dār al-Fikr al-ʿArabī, nd), pp. 298-308, 473-480.

<sup>60</sup> See for more examples: al-Suyūṭī, *al-Ashbāh*, pp. 160-161. Ibn Nujaym, *al-Ashbāh*, 189. Al-Rūgī, *Nazarīyyat al-Taqīd*. 62. Shubayr, *al-Qawāʿid al-Kullīyyah*, 294.



### 4.3. *Qawā'id* of *Ḍamān* (Liability and Compensation)

#### 4.3.1. Introduction.

According to the Islamic scholarship, the *Shari'ah*, on the whole, was revealed to protect, promote and preserve fundamental values, which are considered to be the essential requirements for the survival and spiritual well-being of individuals.<sup>61</sup> These essential values, enumerated as five, are life, intellect, faith, lineage and property. Accordingly, the *Shari'ah* prescribes specific methods in order to guarantee the preservation and advancement of these universal values, and permits all necessary means to achieve this goal.<sup>62</sup> In this regard, multiple affirmative and punitive approaches are legislated.

The concept of *Ḍamān* (liability and compensation) is one of the approaches laid down by the *Shari'ah* to protect the said five values, especially life and wealth.<sup>63</sup> However, *Ḍamān*, although it has wide connotations in the Islamic legal discourse, is used in two main approaches. First, it is used by the Ḥanafī school of law to employ the meaning of *kafālah* (surety), in which a third party becomes surety for the payment of a debt.<sup>64</sup> It has been defined in this sense as, “the joining of one’s *dhimmah* (faculty by which one bears liabilities) to another as to a debt”, which simply means to have a third person liable for the debt alongside the original

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<sup>61</sup> Ahmad al-Raysūnī; Muhammad al-Zuhaylī; Muhammad Shubayr, *Huqūq al-Insān Miḥwar Maqāsid al-Shri'ah*, Kitāb al-Ummah, No. 87, (Doha: Wazārat al-Awqāf wal-Shu'ūn al-Islāmiyyah, Marsh 2002), pp.79-81. See also: <http://www.aml.org.uk/journal/3.1/Kamali%20-%20Maqasid.pdf>, page 2.

<sup>62</sup> Al-Raysūnī and others, *Huqūq al-Insān*, pp. 83-84.

<sup>63</sup> *Al-Mawsū'ah al-Fiqhiyyah*, 28:221.

<sup>64</sup> *Ibid.*, 28:219.

debtor.<sup>65</sup> Second, according to the Ḥanafīs, *ḍamān* means the obligation to pay a financial compensation as a result of an injury caused to others.<sup>66</sup> The *Majallat al-Aḥkām al-ʿAdliyyah* defined the term as, “Indemnification consists of giving a similar thing if it is a thing the like of which can be found in the market, or the value thereof, if it is a thing the like of which cannot be found”.<sup>67</sup>

The Ḥanafī approach of interpreting *ḍamān* is in fact the major topic of the theory of liability and compensation in Islamic law.<sup>68</sup> Although the other approach is also discussed in lesser scale. *Ḍamān*, accordingly, encompasses liability in all related financial and criminal cases. “It is a collection of various principles that deals with the law of contractual liability or the law of tort liability. This results in a general rule according to which compensation must be paid for any damage or injury caused to others”.<sup>69</sup> Al-Shawkānī (d. 1250 / 1834) defined it in this general sense saying: “*ḍamān* is simply to compensate any destruction”.<sup>70</sup> Therefore, the essential aim of the whole system is to compensate the injured and to deter the potential injurer.<sup>71</sup>

Jurists have formulated a number of *qawāʿid* related to the theory of *ḍamān*, aiming to present it in a well-framed legal context. Each plays the

<sup>65</sup> Al-Ābī, *Jawāhir al-Iklīl Sharḥ Mukhtaṣar Sidī Khalīl*, (Beirut: Dār al-Maʿrifah, nd), 2:109. Frank E. Vogel And Samuel L. Hayes, *Islamic Law and Finance*, (The Hague: Kluwer Law International, 1998), 106.

<sup>66</sup> *Al-Mawsūʿah al-Fiqhiyyah*, 28:219. Muhammad Ali El-Garī, ‘Credit Risk in Islamic Banking and Finance’ in: *Islamic Economic Studies*, Vol. 10, No. 2, March 2003, (Jeddah: Islamic Research and Training Institute, Islamic Development Bank), 13.

<sup>67</sup> See: *al-Mawsūʿah al-Fiqhiyyah*, 28: 220.

<sup>68</sup> Shubayr, *al-Qawāʿid al-Kulliyyah*, 311.

<sup>69</sup> Patrick Le Roy, *Liability and Compensation for Bodily Injury Under Islamic Law*, Injury Under Islamic Law.

<sup>70</sup> Al-Shawkānī, *Nayl al-Awtār*, 5:299.

<sup>71</sup> Monzer Kahf, ‘Economic of Liability: An Islamic View’, in: *IIUM (The International Islamic University Malaysia) Journal of Economics and Management*, Vol. 8, no. 2 (Kuala Lumpur, 2000), 86. See also: *al-Mawsūʿah al-Fiqhiyyah*, 28: 221.

function of a *ḍābiṭ* (controller) and serves the whole theory in a different aspect, such as being an exception, a condition or a provision. These principles are applicable to most cases in the financial and criminal law, where the concept of *ḍamān* has a strong presence. It is worth mentioning that the wordings of a number of the *qawā'id* of *ḍamān* are the exact words of Prophetic traditions, which may reflect how important is the subject on one hand, and strengthen their authority as legal principles on the other. The following are the most common *qawā'id* of the theory of *ḍamān*.

#### 4.3.2. *Al-Jawāzu al-Shar'iyyu Yunāfi al-Ḍamān.*

(Legal permission is incompatible with liability),

This is the first *qā'idah* in this field. It is article number 90 in *Majallat al-Aḥkām al-Adliyyah* and is in al-Suyūṭī's collection of *al-qawā'id al-kulliyah* in different wordings. It is also mentioned in some books of *qawā'id* using either the same or different words, such as *al-Manthūr* of al-Zarkashī (d. 794 / 1392), *Manāfi' al-Daqā'iq* of al-Khādimī (d. 1168 / 1754), *al-Farā'id al-Bahiyyah* of Mahmūd Ḥamzah (d. 1305 / 1887),<sup>72</sup> and in a number of modern works, such as *al-Madkhal al-Fiqhī al-Āmm* by Muṣṭafā al-Zarqā, *al-Qawā'id al-Fiqhiyyah Bayna al-Aṣālah wal-Tawjih* by Muhammad Bakr Ismā'īl and *al-Wajīz Fī 'Īdāḥ al-Qawā'id al-Fiqhiyyah* by Ṣidqī al-Būrnū.<sup>73</sup>

<sup>72</sup> See: al-Būrnū, *al-Wajīz*, 362.

<sup>73</sup> See: al-Zarqā, *al-Madkhal*, 2:1035, Ismā'īl, *al-Qawā'id al-Fiqhiyyah*, 210, al-Būrnū, *al-Wajīz*, 362.

The *qā'idah* means that an act allowed by the law cannot be made the subject of a claim to compensation.<sup>74</sup> In other words, if an injury was a result of a lawful action, the injurer is not liable for the damage caused, and subsequently, he is not to compensate the affected person. This is simply because the permission of the law is incompatible with liability, since the law does not permit something and at the same time, forbids what might result from it, unless it is deviated from the prescribed lawful way.<sup>75</sup> For example, since one is allowed to dig a well in one's own farm, if a pet or cattle belonging to his neighbour entered the farm and fell into the well and perished, one is not liable to compensate the neighbour. Similarly, if one hired a van to use for agreed upon purposes and one totally complied with the instructions related to the capacity of the van, one is not liable for any damage that happens to the vehicle.<sup>76</sup> In another topic, a surgeon is totally free from any legal liability if the situation of the patient worsened after the surgery, as long as he, the surgeon, adhered to the established medical methods in carrying out the operation.<sup>77</sup>

Besides the general natural legal permission, which is granted to all individuals to enjoy in normal circumstances, jurists have mentioned a number of urgent situations when one is also free from legal liability.<sup>78</sup> One of these situations is known as *ḍaf' al-ṣā'il*, which literally means to repel the attacker. It is a self-defence situation, when one is forced to fight against

<sup>74</sup> Al-Zarqā, *al-Madkhal*, 2:1035. Ismā'il, *al-Qawā'id*, 210. C. A. Hooper, , "The Mejelle. Articles 1-100", in: *Arab Law Quarterly*, Vol. 1, No. 4 (Aug., 1986), 379.

<sup>75</sup> Al-Zarqā, *al-Madkhal*, 2:1035.

<sup>76</sup> Ali Ḥaydar, *Durar al-Ḥukkām*, 1:82. Al-Zarqā, *al-Madkhal*, 2:1035.

<sup>77</sup> Muhammad Ṭalāfḥah, 'Qā'idat al-Jawāz al-Shar'ī Yunāfī al-Ḍamān Wataḥbīqātuhā fil-Fiqh al-Islāmī wal-Qānūn', in: *Al-Majallah al-Urduniyyah fil-Dirāsāt al-Islāmiyyah*, Vol. 2, No. 4 (al-Mafraq – Jordan: 2006), 207.

<sup>78</sup> Ibid.

a thief, or any other aggressors, who broke in one's own property for stealing or any other harmful actions. If the fighting resulted in the wounding or even the killing of the aggressor, one is exempted from any legal liability, such as the payment of the *diyyah* or the blood money to the aggressor or to his family. The same determination is applicable to the situation, where one is attacked by an animal, such as an angry bull or camel. One is not to pay any compensation to the owner if one, to defend himself, killed the animal.<sup>79</sup>

Although legal permission is incompatible with liability, the abuse of rights is prohibited in Islamic law, and will result in legal procedures, among which is paying compensation to the affected persons where applicable. For example, although one has the right to dig a well in one's own piece of land, it is not allowed for him to do so in a way that may harm his neighbour, such as digging the well very close to the neighbour's fence or wall, which may result in its collapse. Likewise, one is encouraged to allocate some of his wealth as *waqf* (endowment) or as *ṣadaqah jāriyah* (continuous charity) to those in need, be they persons or social institutions. Yet, if the intention is to escape paying the obligatory *zakāh* or to not give the money back, in case of being indebted to some people; he is then to be forced to fulfil these obligations, before he can practice his rights. On the other hand, although one is not to be detained if one consumed other people's food or drink or used others' vehicles in cases of urgent necessity (such as eating others' food to survive hunger, or using their cars without their permission to drive to hospital to deal with an urgent critical situation), one

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<sup>79</sup> See the full details of *dafʿ al-ṣāʿil* in: *al-Mawsūʿah al-Fiqhiyyah*, pp.28: 102-112. However, the Ḥanafis view that one is to pay compensation to the owner if he killed or injured the attacking animal, since one destroyed others' wealth in order to survive. They built their argumentation on a legal principle indicating that necessity does not invalidate the right of another. See *al-Mawsūʿah al-Fiqhiyyah*, 28:106.

is still obliged to pay them the cost of the food and the rent of the car. The legal principle says in this regard, “Necessity does not invalidate the right of another”.

#### 4.3.3. *Al-Kharāju Bi-l-Damān*

(Gain accompanies liability for loss)

This is a well-known legal maxim, which has been mentioned and discussed in almost all books of *qawā'id*, both classical and modern. It is article 84 in *Majallat al-Aḥkām al-Adliyyah*, and is in the lists of al-Suyūṭī and ibn Nujaym of what they called *al-qawā'id al-kulliyyah*.<sup>80</sup> Furthermore, it appears 365 times in a search I undertook through electronic databases of tens of *fiqhī* books from different schools of law. It is also frequently used by those who wrote on the history of the discipline of *al-qawā'id al-fihiyyah*, as an example of the legal maxims whose original wordings were Prophetic traditions.<sup>81</sup>

This *qā'idah* is seen to be one of the most important legal principles, which organizes the relationship between the parties in the Islamic law of contracts in terms of liability for loss of, or damage to, the object of a contract.<sup>82</sup> It links revenue to contractual liability, and is, thus, applicable to all financial arrangements and running through the whole of Islamic

<sup>80</sup> See: al-Suyūṭī, *al-Ashbāh*, 135. Ibn Nujaym, *al-Ashbāh*, 175.

<sup>81</sup> See for example: al-Bāḥusayn, *al-Qawā'id*, 193. Al-Rūgī, *Nazarīyyat al-Taḳ'id*, 95. Al-Nadwī, *al-Qawā'id*, 93. The story of the *ḥadīth* whose wordings is exactly the same as this *qā'idah* was narrated by Abū Dawūd, al-Tirmidhī and others, on the authority of ʿĀ'ishah, a man purchased a slave during the time of the Messenger of Allah (PBUH) and he remained with him for some time according to the will of God. Thereafter, he returned him on the basis of a defect that he found. The Messenger of Allah (PBUH) judged in favour of his return on the basis of defect. The person against whom the decision was given said, “but he benefited from him.” The Messenger of Allah (PBUH) replied: *al-kharāj bil-damān*.” See: Shubayr, *al-Qawā'id al-Kulliyyah*, 312. The translation is borrowed from: Mohamed Ali El-Gari, “Credit Risk in Islamic Banking and Finance”, in: *The Journal of Islamic Economic Studies*, Vol. 10, No. 2 (Jeddah, 2003), 13.

<sup>82</sup> Vogel and Hayes, *Islamic Law and Finance*, 112.

contract law.<sup>83</sup> Its importance lies in its content linking ethical values to legal rules, since it seeks to achieve the value of justice involving financial transactions.<sup>84</sup>

The *qā'idah* indicates that in any transaction when a party enjoys benefit from an object, the party is to bear and assume the risk of its loss or damage. Therefore, while the borrower of a car, for example, is benefiting from its services, he is to be responsible for its loss or for any damage that happens to the vehicle. Similarly, if one found a defect in an object one bought, one is not to compensate the seller for the profit one reaped from the object before returning it back to him, since one was completely liable for its loss or damage.<sup>85</sup> In contrast, in contracts, such as *al-rahn* (pledge or mortgage), *al-wakālah* (agency), *al-wadī'ah* (a contract in which one leaves one's own property for safe protection to another person), where the party who holds the property is not allowed to benefit from it, the holder does not bear the risk of loss or damage. This is simply because the owner chose the trustee and entrusted the object to him. The trustee is holding the object mainly for the benefit of owner, and is just keeping it on his behalf.<sup>86</sup> In such contracts, the holder is called *amīn* (trustee) whose main duty is to take care of the object. However, the *amīn* in all of these contracts and the like will still enjoy this immunity, unless he violates the trust placed in him, whether, for example, by breaking a condition in the contract or intentionally causing harm to the object he is holding. He is then no longer

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<sup>83</sup> Umar F. Moghul, 'No Pain, No Gain: The State of the Industry in Light of an American Islamic Private Equity Transaction', in: *The Chicago Journal of International Law*, Vol. 7, No. 2 (Chicago, 2007), 478.

<sup>84</sup> Shubayr, *al-Qawā'id al-Kulliyyah*, 311.

<sup>85</sup> Haydar, *Durar al-Hukkām*, 1:78. Shubayr, *al-Qawā'id al-Kulliyyah*, 312. Vogel and Hayes, *Islamic Law and Finance*, 113.

<sup>86</sup> Shubayr, *al-Qawā'id al-Kulliyyah*, 314. Vogel and Hayes, *Islamic Law and Finance*, 113.

*amīn*, but *ḍāmin* instead, and becomes liable for any loss or damage caused by his action.<sup>87</sup>

There are some traditional cases about which there were disputes on whether or not to be exempted from being included in the sphere of this *qāʿidah*. One is known to be the case of *al-muṣarrah*. It is when an owner of a goat or a she-camel, aiming to deceive others in the market, ties up its udder until it bloats because of the milk in it. If the deceived buyer, discovering after a few days that it does not actually give that much milk, wanted to return it back to its owner, he is instructed in a Prophetic tradition to return it back along with a *ṣāʿ* (a quantity measures four handful) of dates.<sup>88</sup> According to the majority of the scholars, this case is exempted from the application of this *qāʿidah* because of the instruction of the *ḥadīth*. However, Abū Ḥanīfah, considering this *qāʿidah* as a legal principle, and did not accept this case to be exempted. He argued that since the buyer bears the liability of the animal in case it dies while it is in his possession, he is permitted to reap from the profit (the milk in this case) in lieu of the liability. The buyer should not be liable to anything, be it dates or whatsoever, if he decided to return the animal back.<sup>89</sup>

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<sup>87</sup> Ayman Abū al-ʿIyāl, 'Fikrat Ḍaman al-ʿAqd Fīl-Fiqh al-Islāmī', in: *The Journal of The University of Damascus*, Vol. 19, No. 2, (2003), 85. Vogel and Hayes, *Islamic Law and Finance*, 113. Shubayr, *al-Qawāʿid al-Kulliyyah*, 315.

<sup>88</sup> It is narrated by al-Bukharī and Muslim that the Prophet (PBUH) said, "Don't keep camels and sheep unmilked for a long time, for whoever buys such an animal has the option to milk it and then either to keep it or return it to the owner along with one Sa of dates" See: al-Bukhārī, *al-Ṣaḥīḥ*, *Book of Sale and Trade*, vol. 3, *Ḥadīth* No. 358. *al-Mawsūʿah al-Fiqhiyyah*, 12:74.

<sup>89</sup> See the full details of this disputes in: Abū al-Walīd Ibn Rushd, *Bidāyat al-Mujtahid*, Sixth Edition, (Beirut: Dār al-Maʿrifah, 1982), 2:175. *Al-Mawsūʿah al-Fiqhiyyah*, 12:74. El-Gari, *Credit Risk*, pp. 14-15.



#### 4.3.4. *Idhā Ijtamaʿa al-Mubāshiru wa-l-Mutasabbibu Yuḍāfu al-Ḥukmu Ilā al-Mubāshir.*

(In the presence of the direct performer of an act and the person who is the cause thereof, the first alone is responsible therefore).

This *qāʿidah* is article 90 in *Majallat al-Aḥkām al-ʿAdliyyah*, and one of the maxims in the lists of both al-Suyūṭī and ibn Nujaym. It is also of great presence and mention in the books of *fiqh* of the four schools of law, especially within the chapters of penal law.

The main subject of the *qāʿidah* is determining criminal responsibility. It states that in case the injury was a direct or indirect result of the aggression, the *ḍamān* is on the one, who directly carried out the destruction.<sup>90</sup> Direct destruction is to destroy a thing directly without the involvement of any cause between the act and the result. Indirect destruction, on the other hand, is to do something, which would ordinarily and patently lead to the destruction of something else.<sup>91</sup> To give an example to illustrate the *qāʿidah*, “A digs a well in the public highway, and B causes C’s animal to fall therein and to be destroyed. B is responsible therefore and no liability rests with the person who dug the well”.<sup>92</sup> This is simply because digging a well in itself does not necessarily lead to the destruction of the animal. In other words, had not B in the example caused it to fall in the well, the animal would not be destroyed because of digging the well.<sup>93</sup> Ali Ḥaydar, the commentator of *Majallat al-Aḥkām*, raised a potential objection

<sup>90</sup> Al-Zarqā, *al-Madkhal*, pp. 2:1047-1048.

<sup>91</sup> Maḥmaṣānī, *Transaction in the Shariʿah*, pp. 190-191. Ḥaydar, *Durar al-Ḥukkām*, 1:80.

<sup>92</sup> Hooper, *The Mejlis Articles 1-100*, 379.

<sup>93</sup> Ḥaydar, *Durar al-Ḥukkām*, 1:80.

on the legal ruling of this issue (and apparently the like) saying, “if it is to be said that unless the well was there, the direct performer would not then have caused the destruction of the animal through throwing it therein, the answer is that throwing the animal into the well was the last stage of the incident, so the destruction should be ascribed to its performer”.<sup>94</sup> However, if a human or an animal fell therein without being pushed or thrown, the digger of the well is then liable for any injury, since his action was the direct cause of the incident, provided that he did not have permission to dig the well from the authorities.<sup>95</sup> Another example, if one showed a thief the place of wealth belonging to a third person, the thief would solely be liable to the theft, since it is he who directly carried out the crime.<sup>96</sup>

In fact, there are various legal rulings concerning who would be liable to the injury when there is more than one party to a crime. They are either all involved on the crime, directly or indirectly, and that their participations are equal, or they are all involved in the action, but at different levels of participation. As for the first group, all are equally liable for whatever injury resulted from their action. So all are to face the *qīṣāṣ* (retribution) or pay *diyyah*, if they all at once shot someone else dead. This was the verdict of ‘Umar ibn al-Khaṭṭāb on a crime that took place in Ṣan‘ā’, the capital of Yemen, during his time as a caliph, where a number of people killed one person. He was quoted saying that if all of the people of the city conspired and participated in this crime, all would be then punished by application of the *qīṣāṣ*. As for the second group, who all took part in a crime at once, but the

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<sup>94</sup> Ibid.

<sup>95</sup> Al-Zarqā, *al-Madkhal*, 2:1048. Ḥaydar, *Durar al-Ḥukkām*, 1:80.

<sup>96</sup> Ibn Nujaym, *al-Ashbāh*, 190.

levels of their participation differ, liability would then be distributed accordingly. On the other hand, if the aggression was direct and indirect, and that their involvement in the action was not at the same time, then this is the right sphere of application of the *qā'idah* above.<sup>97</sup>

#### **4.3.5. *Al-Mubāshiru Ḍāminun Wa'in lam Yata'ammad.***

(A person who performs an act, even though not intentionally, is liable to make good any loss caused thereby).

#### **4.3.6. *Al-Mutasabbibu Lā-yaḍmanu Illā Bi-l-Ta'ammud.***

(A person who is the cause of an act being performed is not liable to make good any loss caused by such act unless he has acted intentionally).

These two *qawā'id* are a sequel to the issues of criminal responsibility. They both are in the *Majallah* (articles No. 92 and 93 respectively). They are also mentioned in some books of *fiqh*, especially those by the Ḥanafīs. However, what might be more interesting about them is their opposite significance with regard to the role of *niyyah* (intention) in determining the legal liability for the destruction. While the first does not seemingly give any role to the intention, the second makes it the essential component.<sup>98</sup>

Injury, in terms of the role of the one who performs it, is either direct or indirect. The former is when one does the harmful action himself, and is

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<sup>97</sup> See these details in: *al-Mawsū'ah al-Fiqhiyyah*, pp. 28: 224-225.

<sup>98</sup> Maḥmaṣānī, Subḥī, *Transaction in the Sharī'ah*, 191.

the actual performer of the act. The latter is when a person does something that indirectly causes injury. The performer of a direct injury is legally liable whether their action was done intentionally or unintentionally. On the contrary, the performer of the injury indirectly is liable only if he did the action deliberately and intentionally.<sup>99</sup>

The term, ‘intentionally’, here also covers cases of neglect and carelessness.<sup>100</sup> So, one is totally liable at the loss of the property, which has been entrusted to him to keep safe if he fails, although he is able to transfer it to another place upon the outbreak of a fire, which resulted in the destruction of the property.<sup>101</sup> This does not contradict the fact that such a person is amongst the category of people, who are classed as *amīn* (trustee), which was mentioned above, who do not bear the risk of loss or damage. This is because, the *amīn*, as stated earlier, will enjoy his immunity unless he violates the trust placed in him.

#### **4.3.7. *Jināyatu al-ʿAjmaʿi Jubār.***

(Damage of animals causes no liability)

This *qāʿidah* is article 94 in the *Majallah*. It is of a remarkable presence and mention in the books of *fiqh*, let alone the *qawāʿid* books. This is perhaps due to the awareness of the jurists of the importance of animals in people’s actual life in the past, now and in future, which demands carrying on legal research related to their involvement in people’s life. No

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<sup>99</sup> Haydar, *Durar al-Hukkām*, pp. 1:82-83 Ī 2:531.

<sup>100</sup> Maḥmaṣānī, Subḥī, *Transaction in the Sharīʿah*, 191.

<sup>101</sup> Haydar, *Durar al-Hukkām*, 2:252

doubt that the liability for destruction caused by domestic animals is among the important areas of legal research in this regard.

The *qā'idah* states that no liability attaches in connection with offences or damage caused by animals of their own accord.<sup>102</sup> It is a paraphrasing of a statement in a Prophetic tradition narrated by al-Bukhārī and Muslim, in which the Prophet (PBUH) mentioned a number of things, for which there would be no *diyyah* to be paid to the affected person, if they were the cause of their death or injury.<sup>103</sup> The Prophet (PBUH) said, “Damages of animals cause no liability (the falling in) a well causes no liability and (injury caused while being in) a mine causes no liability...”. Commentators said that the animals meant in the tradition and in the *qā'idah* are those, which escaped from their shackles.<sup>104</sup>

However, in some cases the owner of the animal is bound to make compensation to the affected persons. The following quotations are a number of articles in *Majallat al-Aḥkām al-Adliyyah* discussing this topic.

“(Article 929)...But if an animal consumes the property of some other person and the owner of the animal is cognizant thereof and takes no steps to prevent the injury, the owner is bound to make good the loss. But if the owner of an animal known to be of a destructive character such as a bull which gores, or a dog which bites, is warned by one of the inhabitants of the district or village to tie up such animal, and the owner nevertheless lets him go loose and he destroys the animal or the property of some other person, the owner is bound to make good the loss”.

“(Article 930) If an animal, whether ridden by its owner or not, and while on land owned by him in absolute ownership, injures any other person by striking such person with his fore feet, or with his

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<sup>102</sup> Ḥaydar, *Durar al-Ḥukkām*, 1:83. Shubayr, *al-Qawā'id al-Kulliyyah*, 321. Hooper, *The Mejelle Articles 1-100*, 379.

<sup>103</sup> Ḥaydar, *Durar al-Ḥukkām*, 1:83.

<sup>104</sup> Shubayr, *al-Qawā'id al-Kulliyyah*, 321.

head, or tail, or by kicking with his hind legs, the owner of such animal is liable to make good the loss".  
 "(Article 931) If any person causes any animal to enter the property held in absolute ownership belonging to another, having obtained the permission of the owner of such property to do so, such animal is regarded as being on such person's land, and the owner is not liable to make good the loss in respect to any injury caused by such animal, as set forth in the preceding Article. If the owner has caused the animal to enter without such permission, he is liable in any case to make good any damage caused, whether riding, leading or driving, or even when not near to such animal. But if an animal breaks loose and enters the property of another held in absolute ownership and does damage thereon of its own accord, the owner is not liable to make good the loss".<sup>105</sup>

#### **4.4. QAWĀ'ID AL-ITHBĀT WAL-BAYYINAH.**

(Maxims of Proof and Evidence)

##### **4.4.1. Introduction.**

Protecting the individual's rights and keeping order in society are, theoretically, amongst the main targets of every judicial system, be it customary, religious, or secular. Achieving these goals requires the establishment of competent institutions, where a variety of procedures and manners ought to be adopted, provided, and followed. The law of evidence plays, in this regard, the crucial role in upholding justice and determining the rights of the different parties. Its importance lies in it being the means, which enables the substantive branches of the law, such as commercial law, family law, and criminal law, to operate successfully when disputes arise

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<sup>105</sup> Haydar, *Durar al-Hukkām*, 2:565-566. The translation is borrowed from: ([http://www.iiu.edu.my/deed/lawbase/al\\_majalle/al\\_majalleb08.html](http://www.iiu.edu.my/deed/lawbase/al_majalle/al_majalleb08.html)).

and need judicial consideration.<sup>106</sup> The law is a set of rules and principles, which are applied to every case from the beginning, during trial and until judgement is pronounced.<sup>107</sup>

The Islamic law of evidence, known as *al-ithbāt wal-bayyīnah*, occupies a significant portion in most *fiqh* manuals of the different schools of law in the past and in present. It has been presented comprehensively within the classical books devoted to procedural law, as in *Tabṣīrat al-Ḥukkām* by ibn Farḥūn al-Mālikī (d. 799 / 1397)<sup>108</sup> and *Muḥīn al-Ḥukkām* by al-Ṭarābulusī (d. 844 / 1440).<sup>109</sup> Some works in the modern times were dedicated completely to discussing it exclusively, such as *Nazariyyat al-Itbāt fīl-Fiq al-Jināʿī al-Islāmī* by Ahmad Fathī Bahnasī, *Nazariyyat al-Daʿwā wal-Itbāt* by Naṣr Farīd Wāṣil<sup>110</sup> and *Wasāʾil al-Itbāt fīl-Sharīʿah al-Islāmiyyah* by Muhammad al-Zuhaylī—originally a PhD thesis submitted to al-Azhar University in Cairo in 1973.<sup>111</sup>

The law was built up by the jurists as a theory, originating from some Qurʾānic verses and Prophetic traditions, as well as multiple *fatāwās* and juridical verdicts of the Companions and the leading figures of the schools of the law. All insist and lay emphasis on the necessity and importance of proof to the administration of justice, which prevents false, weak and

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<sup>106</sup> Zulfakar Ramlee, *The Role of al-Qarīnah (Circumstantial Evidence) in Islamic Law of Evidence: a Study of the Law in Malaysia, with Reference to the Rules and Principles of English Law*, a PhD thesis submitted to Department of Law and Public Administration Glasgow Caledonian University, Glasgow, (December 1997), xviii.

<sup>107</sup> Ibid., 2.

<sup>108</sup> *Maktabat Muṣṭafā al-Bābī al-Ḥalabī* in Cairo in 1958.

<sup>109</sup> *Al-Maṭbaʿah al-Amīriyyah* in Cairo in 1300 A.H., first edition.

<sup>110</sup> Both were published by *Dār al-Shurūq* in Cairo in 1989 (fifth edition) and 2002 (first edition) respectively.

<sup>111</sup> *Dār al-Bayān* in Damascus in 1982, first edition.

unsubstantiated claims.<sup>112</sup> However, jurists in the classical periods agreed upon three methods of proof; namely, *al-iqrār* (confession), *al-shahādah* (testimony), and *al-yamīn* (oath).<sup>113</sup> Various other methods, such as *qarīnah* (circumstantial evidence), *kitābah* (a written document), *nukūl* (refusal to take the oath), *‘ilm al-qāḍī* (what has come to the judge’s knowledge outside of court), *alqasāmah* (compurgation; an oath taken by fifty members of a tribe or a locality to defend against accusations of homicide), etc. are also considered among the methods of proof, yet they were not unanimously agreed upon to be as such.<sup>114</sup>

Many *qawā‘id fiqhiyyah* have been formulated and developed to serve and underpin the structure of the theory of evidence in Islamic law. It is remarkable in this regard that the second universal *qā‘idah*; i.e. *al-yaqīn lā yazūl bil-shakk* (certainty is not overruled by doubt) and its subsidiaries have strong presence in this sphere. This may not be surprising, since proving an allegation in court or defending against an allegation requires presentation of evidence in order for the *qāḍī* (judge) to arrive at *yaqīn* (certainty) or *ẓann ghālib* (most plausible conjecture) for a just decision to settle a dispute between the litigants.<sup>115</sup> The following are the most known *qawā‘id* related to this branch of law.

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<sup>112</sup> Muhammad Al-Zuhaylī, *Wasā‘il al-Ithbāt fī al-Sharī‘ah al-Islāmiyyah*, First Edition, (Damascus, Dār al-Bayān, 1982), 34. Mahmassanī, *Falsafat al-Tashrī‘ fī al-Islām*, 168.

<sup>113</sup> *Al-Mawsū‘ah al-Fiqhiyyah*, 1:233. Mahmassanī, *Falsafat al-Tashrī‘*, 173. Ramlee, *The Role of al-Qarīnah*, xviii.

<sup>114</sup> Al-Zuhaylī, *Wasā‘il al-Ithbāt*, 23.

<sup>115</sup> Zuhaylī, *Wasā‘il al-Ithbāt*, pp.23-24. Mahmassanī, *Falsafat al-Tashrī‘*, 168. Ramlee, *The Role of al-Qarīnah*, pp. 4-5.



#### 4.4.2. *Al-Bayyinatu ʿAlā al-Muddaʿī wal-Yamīnu ʿAlā Man Ankar.*

(The burden of proof is on him who alleges; the oath is on whom who denies).

This *qāʿidah* is of a great mention in the books of *fiqh* besides the books of *qawāʿid*. It appeared hundreds of times in a search of electronic databases through tens of *fiqhī* books from different schools of law. On the other hand, it is *qāʿidah* number 3 in *al-Usūl* of al-Karkhī (the first written collection of *qawāʿid*), yet appeared in different words, and is article 77 of *Majallat al-Ahkām al-ʿAdliyyah*. It has also been mentioned by al-Suyūṭī and ibn Nujaym in their books, *al-Ashbāh wal-Nazāʾir*, when illustrating the *qāʿidah*, which says, ‘*al-aṣl barāʾat al-dhimmah*’ (freedom of liability is a fundamental principle). This is a subsidiary *qāʿidah* under the second universal one (i.e. certainty is not overruled by doubt). Moreover, al-Shāṭibī (d. 790 / 1388) in *al-Muwāfaqāt* counted it amongst the *qawāʿid qaḍāʾiyyah* (judicial rules), which every judge needs to consider,<sup>116</sup> referring probably to the famous letter of the Caliph ʿUmar ibn al-Khaṭṭāb, which he sent to the judge of al-Baṣrah, Abū Mūsā al-Ashʿarī, which included valued judicial rules; among which is this *qāʿidah*.<sup>117</sup>

The *qāʿidah* is mentioned as an example of the legal maxims whose original wordings were Prophetic traditions by those who wrote on the history of the discipline of *al-qawāʿid al-fiqhiyyah*.<sup>118</sup> Accordingly, it is almost the exact wordings of a statement mentioned in a Prophetic *ḥadīth* narrated by al-Tirmidhī (d. 279 / 892) and al-Bayhaqī (d. 458 / 1066) saying:

<sup>116</sup> Al-Shāṭibī, *al-Muwāfaqāt*, pp. 4:92-93.

<sup>117</sup> See the full text of this letter in Ibn al-Qayyim’s *Iʿlām al-Muwaqqiʿīn*, 1:86.

<sup>118</sup> See for example: al-Bāḥusayn, *al-Qawāʿid*, pp.194-195. Al-Rūgī, *Nazarīyyat al-Taḳīd al-Fiqhī*, 94. Al-Nadwī, *al-Qawāʿid*, 276.

“If the people were given according to their claims, they would claim the lives of persons and their properties, but proof should be on he who alleges and the oath must be taken by he who denies”.<sup>119</sup>

Being as such may strengthen its authority as a *qā'idah* on the one hand, and reflect the importance of its content on the other.

The *qā'idah* is on the burden of proof. As it is supposed to be known to all, there are at least two litigants in every judicial dispute, the plaintiff and the defendant. The former is someone who initiates a lawsuit, claiming his right in the presence of a judge from another, and the latter is the one against whom the claim is made.<sup>120</sup> According to this *qā'idah*, the onus of proof is on the plaintiff, because he claims something against the *ẓāhir* (apparent fact) or *al-barā'ah al-aṣliyyah* (the normal state), so he needs to prove his claim. On the contrary, the defendant, if he denies the claim, ought to, upon the request of the plaintiff, make an oath to insure the continuity of the original state as being free from any legal liability.<sup>121</sup> This is expressed obviously in another *qā'idah fiqhiyyah* in this field, which says: “the object of evidence is to prove what is contrary to appearance; the object of the oath is to ensure the continuance of the original state”. Furthermore, a claim is a mere *khavar* (report) and *khavar* is either true or false. The true one is what corresponds to reality, and the false is what does not. Therefore, the

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<sup>119</sup> See: al-Tirmidhī, *al-Sunan*, (1341) and al-Bayhaqī, *al-Sunan*, (10:252). However, the *ḥadīth* is partially narrated by Muslim in his *al-Ṣaḥīḥ*, Book 18, Number 4244, on the authority of Ibn ʿAbbas that the Prophet (PBUH) said, “If the people were given according to their claims, they would claim the lives of persons and their properties, but the oath must be taken by the defendant”.

<sup>120</sup> See: *Majallat al-Aḥkām al-ʿAdliyyah*, 231. See also: Burhānuddīn ibn Farḥūn, *Tabṣīrat al-Ḥukkām*, ed. Jamal Marʿashlī, First Edition, (Beirut, Dār al-Kutub al-ʿIlmiyyah, 1995), pp. 105-106.

<sup>121</sup> Ḥaydar, *Durar al-Ḥukkām*, 1:66. Ibn Farḥūn, *Tabṣīrat al-Ḥukkām*, 105. Mahmassani, *falsafat al-Tashrīʿ*, pp. 169-170. Al-Zarqā, *al-Madkhal*, 2:1056.

plaintiff's claim would remain a mere report, which can be either true or false unless he succeeded to prove it in order for the court to issue a judgement in his favour.<sup>122</sup> For example, if A initiates a lawsuit claiming that B owes him a certain sum of money, but B denied. The normal state for a person is not to owe anything; hence, A is ought to provide the court with a proof to support the claim, otherwise his claim would not be considered in the first place.

The word *bayyinah* lexically means the obvious or evident. According to the Islamic law of evidence, *shahādah* (testimony of the witnesses) is the most important method of proof. However, the majority of the scholars in the past seem to have restricted the technical meaning of *bayyinah* to *shahādah*, so much so the two terms were used interchangeably.<sup>123</sup> According to them, the *Qurʾān* itself considers such testimony as the basis of proof in many cases, including transactions between people, matters of personal status, such as divorce and wills, and even in criminal offences, such as accusation of adultery.<sup>124</sup> Although they sanctioned *shahādah* in all cases, they held different opinions with regard to the number of witnesses required in the different cases. However, trustworthiness in general is a very crucial element in accepting testimony, and subsequently determining the truth.<sup>125</sup>

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<sup>122</sup> Ḥaydar, *Durar al-Ḥukkam*, 1:66.

<sup>123</sup> Muhammad Al-Tahānawī, *Kashshāf Iṣṭilāḥāt al-Funūn*, ed. Ali Daḥrūj, First Edition, (Beirut: Maktabat Lubnān, 1996), 1:357. Al-Zuḥaylī, *Wasāʾil al-Ithbāt*, 673. Ramlee, *The Role of al-Qarīnah*, pp. 9-10, citing: al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:461; al-Sarakhsī, *al-Mabsūṭ*, pp. 16: 112-113; Ibn Qudāmah, *al-Mughnī*, 11:403; al-Bahāʾī, *Min Ṭuruq al-Ithbāt*, 5. See also: Ḥaydar, *Durar al-Ḥukkam*, 1:66.

<sup>124</sup> Ramlee, *The Role of al-Qarīnah*, 9.

<sup>125</sup> Mahmassani, *Falsafat al-Tashrīʿ*, pp. 176-177. See detailed research for *shahādah*: al-Mawsūʿah al-Fiqhiyyah, pp. 26: 214-253

A number of jurists have widened the connotation of the concept of *bayyinah* in Islamic law to include all methods by which the truth becomes evident. Al-Qarāfī, ibn Taymiyyah, ibn al-Qayyim (d. 751 / 1350), ibn Farḥūn and al-Zaylaʿī (d.762 / 1361) are amongst the scholars who adopted this approach. According to al-Qarāfī, for example, *al-ithbāt* (evidence) is the process of “establishing the factual occurrence of a legal cause before a judge by way of valid courtroom evidence”.<sup>126</sup> Ibn al-Qayyim was more open when he said in this regard:

“The word ‘*bayyinah*’ in the language of the Qurʾān, of the Prophet (PBUH) and of his Companions is the name of everything by which the truth becomes evident. Hence contrary to its connotations in the terminology of the jurists, it has a wider meaning because they only use it for two witnesses or an oath and a witness”.<sup>127</sup>

Apparently, the main reason behind the adoption of this approach by the mentioned scholars was the insufficiency of *shahadah* to be the sole proof, as witnesses, in many cases, may forget the event or give *shahādat zūr* (false testimony). They, in this regard, proposed the consideration of *qarīnah* (circumstantial evidence) to be included in the scope of *bayyinah* besides *shahādah*. According to them, *qarīnah* is whatever circumstantial evidence that helps to reveal the truth,<sup>128</sup> and can also cover situations where *shahādah* and other manners of proof fail or face obstacles in their

<sup>126</sup> Shihāb al-Dīn al-Qarāfī, *al-Iḥkām fī Tamyiz al-Fatāwā ʿAn al-Aḥkām*, ed. ʿAbd al-Fattāh Abū Ghuddah, Second Edition, (Beirut: Dār al-Bashāʿir al-Islāmiyyah, 1995), 142. The translation is taken from: Jackson, Sherman, *Islamic Law and the State*, in: Studies in Islamic Law and Society, ed. Ruud Peters and Bernard Weiss, Volume 1, (Leiden, BRILL, 1996), 163.

<sup>127</sup> Shamsuddīn Ibn Qayyim al-Jawziyyah, *Iʿlām al-Muwaqqiʿīn ʿAn Rabb al-ʿĀlamīn*, ed. Ṭaha Saʿd, (Cairo, Maktabat al-Kulliyyat al-Azhariyyah, 1968), 1: 98. Translation is borrowed from: <http://www.monthly-renaissance.com/issue/content.aspx?id4447>.

<sup>128</sup> Ibn al-Qayyim, *Iʿlām al-Muwaqqiʿīn*, 1:90

application. To support their argument, they mentioned several Qurʾānic verses, Prophetic traditions and *fatāwā* of the companions or other leading figures where which *qarāʾin* were the grounds of a decree or a *fatwā*.

For example, they quoted the Qurʾānic verses on the story of the Prophet Yūsuf (Joseph) (PBUH) when the wife of the ʿAzīz (minister) of Egypt sought to seduce him and closed the door. Yāsuf (PBUH) refused to succumb and both raced to the door and she tore his shirt from the back. They both found her husband near the door, but she quickly spoke accusing Yūsuf that he seduced her. A witness of her household bore testimony that if it be that his shirt is torn from the front then her tale is true and he is a liar, but if the shirt is torn from the back then she has told a lie and he is speaking the truth. When the husband found that the shirt was torn from the back, he realized that his wife was guilty, and said, as in the Qurʾān, “Surely it is a plot of you women! Certainly mighty is your plot”.<sup>129</sup> Ibn al-Qayyim said that the husband in this story arrived at the truth on the ground of a *qarīnah*, and that Allah did not denounce his action, nay He authorized it.<sup>130</sup>

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<sup>129</sup> *Sūrat Yūsuf*: 28.

<sup>130</sup> Shams al-Dīn ibn Qayyim al-Jawziyyah, *al-Ṭuruq al-Ḥukmiyyah Fīl-Siyāsah al-Sharʿiyyah*, ed. Muhammad Ghazī, (Cairo: Maṭbʿat al-Madani, nd), 7. Ibn al-Qayyim also mentioned the judgment known as the Judgment of the Prophet Sulaymān (Solomon) (PBUH), when two women came before him to resolve a quarrel about which was the true mother of a baby. Each claimed the baby as her own; Sulaymān suggested dividing the baby in two with a sword. One of the women cried asking him to give the baby to the other woman. He revealed that she was the true mother because she showed compassion, as she was willing to give up her baby to the lying woman in order for him to survive. Sulaymān then declared this woman to be the true mother, and gave the baby back to her. See: Ibn al-Qayyim, *al-Ṭuruq al-Ḥukmiyyah*, 6. See for more examples: Ibn al-Qayyim, *al-Ṭuruq al-Ḥukmiyyah*, pp. 6-20. Ibn Farḥūn, *Tabṣīrat al-Ḥukkām*, pp. 1: 172-174.

They also considered the legal verdicts whose ground is *nukūl* (refusal of the defendant to take an oath), which is one of the methods of evidence, as an apparent consideration of *qarīnah*. Accordingly, if the defendant refused to take an oath, he would have been regarded as having admitted the claim of the plaintiff, otherwise he would defend it by taking the oath. Thus, his refusal is a *qarīnah* which indicates that the claim is true, and subsequently is given priority over the normal state of the defendant being free of any legal liability.<sup>131</sup>

*Yamīn* (oath) is the other principle mentioned in the *qā'idah*. As it is stated therein, the plaintiff is required to present evidence for his claim to be considered. Should he fail to do so, or if his evidence was unacceptable, and the defendant denies the claim, the latter, upon the request of the former, is required to take an oath to defend the claim. If he does so, he will be entitled to what the plaintiff was claiming from him, and the case will be rejected and dismissed.<sup>132</sup> This type of oath is known as *al-yamīn al-rāfi'ah* (the revoking oath) because it revokes and cancels the right of the plaintiff.<sup>133</sup>

If the defendant refused to take the oath, the judge, according to some jurists, is to rule in favour of the plaintiff, as the refusal is considered an admission to the plaintiff's claim, and this is what is known as *al-qaḍā' bil-nukūl* (verdicts whose grounds are the refusal of the defendant to take the oath). Other scholars held the view that the refusal of the defendant is not sufficient grounds for the ruling to be against him. Instead, the plaintiff will

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<sup>131</sup> Ibid., 9.

<sup>132</sup> See: *al-Mawsū'ah al-Fiqhiyyah*, 7:251.

<sup>133</sup> Al-Zuhaylī, *Wasā'il al-Ithbāt*, 357.

be required to take the oath, and if he does so, the claim against the defendant will stand proved; otherwise the case will be dismissed.<sup>134</sup> On the other hand, jurists are not in agreement whether the claim would be reconsidered in case the plaintiff, while failing to present evidence the first time, succeeded to do so another time. The Mālikīs maintain that the claim is dismissed forever, and that the oath is decisive in the dispute, unless the plaintiff was not aware of the existence of his evidence when he requested the defendant to take the oath. According to the other schools of law, in contrast, the oath is a weak method of evidence, which can be overridden by *bayyinah*, which is the original method; hence the plaintiff can initiate another case for the same right.<sup>135</sup>

#### 4.4.3. *Al-Marʿu Muʾākhadhun Bi-Iqrārīh.*

(A person is bound by his own admission).

This *qāʿidah* is on *iqrār* (admission). It is almost a unanimously agreed upon legal principle by the different schools of law. It is also amongst the *qawāʿid* of *Majallat al-Ahkām al-ʿAdliyyah*, and many other *qawāʿid* manuals.

*Iqrār* is considered to be *sayyid al-adillah* (the chief of proofs) and the strongest evidence for the establishment of the plaintiff's claim.<sup>136</sup> It is for

<sup>134</sup> Al-Suyūṭī, *al-Ashbah*, 504. *Al-Mawsūʿah al-Fiqhiyyah*, pp. 41:363-367. Mahmassani, *Falsafat al-Tashrīʿ*, pp. 192-193. Bahnasī, *Nazarīyyat al-Ithbāt*, pp. 218-219.

<sup>135</sup> *Al-Mawsūʿah al-Fiqhiyyah*, pp. 1: 238-239. Mahmassani, *Falsafat al-Tashrīʿ*, pp. 191-192.

<sup>136</sup> Al-Ghiryānī, *Taṭbiqāt Qawāʿid al-Fiqh*, 72. Al-Zuhaylī, *Wasāʾil al-Ithbāt*, 241. Mahmassani, *Falsafat al-Tashrīʿ fil-Islām*, 173.

someone to admit the right of another against himself.<sup>137</sup> It brings the dispute to an end, and saves time and effort for the plaintiff and the court to carry on the case, as it results in the entitlement of the plaintiff to what he was claiming from the defendant.<sup>138</sup>

The *muqirr* (one who makes *iqrār*) should be of sound mind, free from duress and interdiction, and should have reached the legal age of discretion.<sup>139</sup> However, scholars have had different opinions regarding the admission made in the state of intoxication. The Ḥanafīs are of the view that he is bound to what he admitted, except for crimes relating to *ḥudūd*. The Mālikīs maintain that he is not bound to his admission except for the crimes. The Shāfiʿīs and the Ḥanbalīs are of the view that he is bound to whatever he admitted.<sup>140</sup>

On another hand, if it relates to the rights of other individuals, the defendant is not permitted to retract his admission. The other *qaʿidah fiqhiyyah* says stressing this point, “If any person seeks to disavow any act performed by himself, such an attempt is disregarded”.<sup>141</sup> Yet, in cases related to *ḥudūd*, he can withdraw it even after the sentence has been passed, and the punishment may not be carried out. This is because retraction in these cases gives rise to *shubḥah* (doubt), which obstructs

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<sup>137</sup> Al-Tahānawī, *Kashshaf*, 1:246. *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaytiyyah*, 6:46. Al-Zuhaylī, *wasāʾil al-Ithbāt*, 233.

<sup>138</sup> *Al-Mawsūʿah al-Fiqhiyyah*, 6:48. Al-Zuhaylī, *Wasāʾil al-Ithbāt*, 241.

<sup>139</sup> Al-Būrnū, *al-Wajīz*, 355. Al-Zuhaylī, *Wasāʾil al-Ithbāt*, 248. Bahnasī, *Nazarīyyat al-Ithbāt*, 164. *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaytiyyah*, pp. 6:50-52.

<sup>140</sup> *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaytiyyah*, 6:50.

<sup>141</sup> Al-Būrnū, *al-Wajīz*, 360.



carrying out the punishment, complying with the Prophetic *ḥadīth* which says, “Set aside punishment when there is a doubt”.<sup>142</sup>

#### 4.4.4. *Al-Bayyinatu Ḥujjatun Mutaʿaddiyatun, wal-Iqrāru Ḥujjatun Qāṣirah,*

(Evidence is a proof, which has a transitive effect, and admission is a proof which is restricted in its effect).

This *qāʿidah* is a refined version of *qāʿidah* number 11 in *Uṣūl al-Karkhī*, and is *qāʿidah* number 77 in *Majallat al-Aḥkām*. It is also mentioned much in the books of *fiqh*, especially by the Ḥanafīs. Al-Suyūṭī and ibn Nujaym, although they did not count it amongst the *qawāʿid kulliyyah*, mentioned and illustrated it in the chapter of admission in their books, *al-Ashbāh wal-Nazāʾir*.<sup>143</sup>

It states that although *iqrār* is the strongest proof in the area of law of evidence, it is of a restricted and relative effect, i.e. it only affects the person who makes it and does not affect other persons. On the other hand, the effect of the *bayyinah*, be it *shahādah*, *qarīnah*, etc., is an absolute proof, which extends to third persons.<sup>144</sup> For example, if, in a case of debt, there were more than one defendant, some of whom admitted the debt, while others denied; admission would bind only those who admitted, so that they will be considered as indebted to the plaintiff and should, accordingly, give him back his money. Other defendants will be exempted from being as such,

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<sup>142</sup> *Al-Mawsūʿah al-Fiqhiyyah*, 6:72. Mahmassani, *Falsafat al-Tashrīʿ*, 174. Kamali, *Sharīʿah Law*, 183. Wāṣil, *Nazarīyyat al-Daʿwā*, pp. 54-55.

<sup>143</sup> Al-Suyūṭī, *al-Ashbāh*, pp. 464-465. Ibn Nujaym, *al-Ashbāh*, 302.

<sup>144</sup> Ḥaydar, *Durar al-Ḥukkām*, 1-68. Al-Zarqā, *Sharḥ al-Qawāʿid*, 395. Al-Zuhaylī, *Wasāʾil al-Ithbāt*, 255.

unless the plaintiff presented strong evidence, which proves that all were indebted to him.<sup>145</sup> However, there are some cases where *iqrār* may affect other persons too. For example, if one admitted in the court that he owed the plaintiff a certain sum of money, yet one had no money to return the debt back, unless one is to sell a house which is in a hire contract in that particular time; the house is to be sold accordingly, although this may affect the tenant of the property.<sup>146</sup>

#### 4.4.5. *Al-Ḥudūdu Taṣquṭu Bi-l-Shubuhāt.*

(*Ḥudūd* punishments are to be warded off if doubts persist).

This *qā'idah* is mentioned almost verbatim in a Prophetic tradition narrated by al-Tirmidhī and others, saying, "Prevent the application of *ḥudūd* punishment (as much as you can) whenever any doubts persists". Hence, it is an agreed upon legal principle in the four schools of law.<sup>147</sup> The *qā'idah* is in the lists of al-Suyāṭī and ibn Nujaym of the *qawā'id kulliyyah*, and is mentioned by al-Subkī when illustrating the universal *qā'idah* (certainty is not overruled by doubt).<sup>148</sup> The *qā'idah* is not mentioned amongst the *qawā'id* of *Majallat al-Aḥkām al-Adliyyah*. The reason perhaps is that the *Majalla* concerned with the commercial law, while this *qā'idah* is mainly on criminal law.

<sup>145</sup> Mahmassani, *Falsafat al-Tashrī'*, 174. Al-Būrnū, *al-Wajīz*, 357.

<sup>146</sup> Al-Zarqā, *Sharḥ al-Qawā'id*, 396. Al-Būrnū, *al-Wajīz*, 357.

<sup>147</sup> Ibn Nujaym, *al-Ashbāh*, 142.

<sup>148</sup> See: al-Syūṭī, *al-Ashbāh*, 122. Ibn Nujaym, *al-Ashbāh*, 142. Ibn al-Subkī, *al-Ashbāh*, 1:31.

The *qā'idah* states that doubts do ward off *hudūd* punishments. According to another *qā'idah fiqhiyyah*, *al-barā'ah al-aşliyyah* (the normal state) is a fundamental principle in Islamic law. Hence, in Islamic criminal law, the accused person is innocent until otherwise proven. Moreover, emphasis is placed on the necessity of proving, so that the accusation of any person should be genuine before the implementation of the punishment. This is because, "any doubt suspected in litigation will be considered an impediment to the validity of the suit and so provide grounds as to why guilt cannot be established against the accused person".<sup>149</sup>

According to Islamic penal law, punishments are of three types in terms of the crimes they are prescribed for. They are *hudūd* (prescribed punishments for apostasy, fornication, theft, drinking, slander and highway robbery, the crimes which violate what is known as *huqūq Allāh*, Rights of God), *qişās* (retaliation, for homicide and violent injuries) and *ta'zīr* (unfixed punishments, left to the discretion of the judge). Each has distinctive characteristics, although they share some common features. Accordingly, a criminal is to face the punishment with regard to the type of his offence.

However, although the *qā'idah* mentioned *hudūd* exclusively, *qişās* punishments are included within the scope of the application of the *qā'idah*. In other words, doubts do not ward off only *hudūd* punishments, but they also avert the implementation of the *qişās* punishments.<sup>150</sup> This may raise a question regarding the terminology usually used to distinguish between the crimes and punishments. Accordingly, *hudūd* are the punishments for those

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<sup>149</sup> Luqman Zakariyah, Applications of Legal Maxims in Islamic Criminal Law, 112.

<sup>150</sup> Al-Suyūṭī, *al-Ashbāh*, 122. Ibn Nujaym, *al-Ashbāh*, 144.

crimes, which violate what is known as *ḥuqūq Allah* (rights of God), whereas *qīṣāṣ* is for crimes which violate *ḥuqūq al-ādamī* (rights of men). Nevertheless, the term *ḥudūd* in the *qāʿidah* refers to both types. A reference, however, to some classical books, reveals that the term *ḥudūd*, although used as described above, is also used to include both types.<sup>151</sup> This, most likely, considers the linguistic connotation of the root verb of the term *ḥudūd*, i.e. *ḥadda*, which means to fix or prescribe. Hence, *ḥudūd* and *qīṣāṣ* are the punishments, which were fixed and prescribed either in the Qurʾān or the *Sunnah* or both, versus the *taʿzīr*, which are left to the discretion of the judge.<sup>152</sup>

#### 4.4.6. *Lā Ḥujjata Maʿa al-Tanāquḍi, Lākin Lā Yakhtallu Maʿahu Ḥukmu al-Hākim.*

(Contradiction and proof are incompatible, but this does not invalidate a judgment).

This *qāʿidah* lays emphasis on the importance of testimony being truthful and expressing the reality.<sup>153</sup> Should the witnesses fall into contradiction with regard to the subject of the claim, their testimony will then be refused, and will not result in the judgement being in favour of the plaintiff. So, in a case of debt, for example, if one of the witnesses said that

<sup>151</sup> See, for example: ibn Rushd, *Bidāyat al-Mujtahid*, pp. 2: 394-395. Ibn al-Qayyim, *al-Ṭuruq al-Ḥukmiyyah*, 1:216. See also: Luqman, *Applications of Legal Maxims in Islamic Criminal Law*, 130.

<sup>152</sup> See: Muhammad Abū Zahrah, *al-ʿUqūbah fīl-Fiqh al-Islāmī*, (Cairo, Dār al-Fikr al-ʿArabī, n.d.), 7, 59.

<sup>153</sup> Al-Zarqā, *Sharḥ al-Qawāʿid*, 405.

the debt was a thousand Libyan Dinars, and another said it was a thousand Pounds Sterling, their testimony will not be admissible. Likewise, if the witnesses retracted their testimony, it is no longer considered as proof.

However, if the contradiction occurred after the judgement has been passed, it would not affect the validity of the judgement to be binding and mandatory. The question to be raised in this context is, who is to be legally liable for the potential injury or loss caused to the defendant as a result of the judgement. Scholars stated that the witnesses will be solely responsible and liable.<sup>154</sup> This, however, might contradict the *qā'idah* in the theory of *damān* (liability), which has been discussed in the previous section. This states that in the presence of the direct performer of an act, and the person who is the cause thereof, the first alone is responsible. The judge in this case, and like ones, is the direct performer of the injury, and the witnesses are the indirect cause; hence, the judge ought to be responsible. To answer this, ʿAlī Ḥaydar says in *Durar al-Ḥukkām* that it is from the duty of the judge to end the dispute and issue the legal rule immediately after the delivery of the testimony, and after he evaluated the trustworthiness of the witnesses and carried on the suit case following procedural methods, so much so, he might be dismissed from office if he was to delay issuing the ruling. Moreover, to make judges responsible (liable) may lead them to leave office, and would not attract others to replace them.<sup>155</sup> In addition, not to invalidate the judgement would preserve the dignity of the judicial office.<sup>156</sup>

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<sup>154</sup> Ḥaydar, *Durar al-Ḥukkām*, pp. 1:70-71.

<sup>155</sup> Ibid.

<sup>156</sup> Al-Zarqā, *Al-Madkhal al-Fiqhī*, 2:1057. Al-Da<sup>cc</sup>ās, *al-Qawā'id al-Fiqhiyyah*, 117.

However, the *Zāhirī* school of law and other scholars maintain that, in case witnesses retract their testimony, a judgement should be revoked. This is because “a judgement is established by testimony; if the witnesses withdraw their testimony, which established the judgement, it would no longer be valid”.<sup>157</sup> Ibn Ḥazm, who is a leading figure in the *Zāhirī* school, said in *al-Muḥallā*:

"if a witness retracted his testimony either before or after the passage of the judgment, the judgment must be revoked.... this also the view of Ḥammad ibn Abī Sulaymān (d. 120 / 738) and of al-Ḥasan al-Baṣrī (d. 110 / 728)".<sup>158</sup>

This is also the position of al-Awzā<sup>c</sup>ī (d. 157 / 774) and Sa<sup>ʿ</sup>īd ibn al-Musayyab (d. 91 / 710). Perhaps, based on the view of the last mentioned scholars many of modern laws in the Muslim countries granted those against whom testimony is given the right to ask for the annulment of the judgment if the falsehood of the testimony upon which the decision is based is established.<sup>159</sup> Ṣubḥī al-Maḥmaṣānī in *falsafat al-Tashrī<sup>c</sup> al-Islāmī* mentioned as examples of these laws article 394 of the Ottoman Criminal Procedure Code and article 537 of the Lebanese Code of Civil Procedure.<sup>160</sup>

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<sup>157</sup> Mahmassani, *Falsafat al-Tashrī<sup>c</sup>*, 199.

<sup>158</sup> <sup>c</sup>Alī ibn Ḥazm, *al-Muḥallā bi-l-Āthār*, (Beirut: Dār al-Fikr, n.d), 8:1801.

<sup>159</sup> Mahmassani, *Falsafat al-Tashrī<sup>c</sup>*, p199.

<sup>160</sup> Ibid., 200.

CHAPTER FIVE

APPLICATION OF *QAWĀ'ID* TO  
CONTEMPORARY MEDICAL ISSUES

## CHAPTER FIVE

### APPLICATION OF *QAWĀ'ID* TO CONTEMPORARY MEDICAL ISSUES

#### 5.1. Introduction

Medicine is seen by different cultures and societies to be one of the most important necessities to all human beings. This is true for both connotations of the concept of medicine, i.e. being an area of knowledge (a body and system of science and diseases) and treatment.<sup>1</sup> Islam is no exception in this regard. *Hifẓ al-Nafs* (protection of life) is the second of the general five *darūriyyāt* (essentials), which the *Shari'ah* aims to achieve. In this respect, the profession of medical practice is considered *farḍ kifāyah* (a religious obligation upon the whole community that can be satisfied by some citizens taking up medicine).<sup>2</sup> Furthermore, it is among the duties of the state to allocate students to study medicine, and to provide the nation with qualified doctors in various specialties until it is seen that the need is satisfied.<sup>3</sup>

On the other hand, seeking medical treatment by sick persons is recommended, in a clear and decisive ordinance. It is narrated that the Prophet (PBUH) said: “Allah has sent down the disease and the cure, and has made for every disease the cure. So treat sickness, but do not use

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<sup>1</sup> Jennifer Alinio, *Importance Of Medicine In Our Daily Lives*, Health and Fitness: Medicine, March 12, 2007, at: ([http://ezinearticles.com/?expert=Jennifer\\_Alinio](http://ezinearticles.com/?expert=Jennifer_Alinio)).

<sup>2</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, pp. 78-79. See also: *al-Mawsū'ah al-Fiqhiyyah*, 12: 135.

<sup>3</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, 79.



anything *ḥarām*”<sup>4</sup>.<sup>5</sup> It even becomes obligatory in cases where not giving medication could cause death, disability or loss of a limb, or where sickness is bound to spread if not treated, as in contagious diseases.<sup>6</sup>

This position towards medicine, both as a science and treatment, resulted in the emergence of many related issues that needed to have the proper legal rulings. Scholars over the course of history have laboured to find rulings for medical issues within the limits of place and time. For example, they had discussions on using intoxicants in medication in the urgent situations, on haemorrhoids surgery, on anaesthetics, on amputation of limbs in case of gangrene, etc.<sup>7</sup> However, due to the nature of intellectual research, there have been many debates over a number of medical issues. For example, jurists were not in agreement over the permissibility of surgical intervention (abdominal incision - what is known now as caesarean section) for a mother in order to rescue a live-term foetus when the mother has died, or determined to have no chance of surviving. The Ḥanafīs and the Shāfi‘īs consider such an operation as permissibility, whereas the Mālīkīs and the Ḥanbalīs view otherwise.<sup>8</sup>

In recent times, scholars work for extracting legal rulings on medical issues, which become more complicated in the contemporary, rapidly

<sup>4</sup> Reported by Abū Dawūd, 4:217.

<sup>5</sup> Alī al-Qarahdāghī, and Ali al-Muḥammadī, *Fiqh al-Qadāyā al-Ṭibbiyyah al-Mu‘āṣirah*, Second Edition, (Beirut, Dār al-Bashā‘ir, 2006), pp.100-101. See also: *al-Mawsū‘ah al-Fiqhiyyah al-Kuwaytiyyah*, 11: 116.

<sup>6</sup> Al-Qarahdāghī and al-Muḥammadī, *Fiqh al-Qadāyā*, pp. 192-193. *Majallat al-Majma‘ al-Fiqhī al-Islāmī* (the journal of the Islamic Fiqh Council), Vol. 7, No. 3, May 1992, pp. 563-564. See also: *Ruling on Giving Medication and Seeking the Patient’s Permission* at: (<http://www.islam-qa.com/en/ref/2148>).

<sup>7</sup> See: al-Shinqīṭī, *Aḥkām al-Jirāḥah*, pp. 285-288; pp. 298-301; pp. 302-305 respectively.

<sup>8</sup> See: al-Shinqīṭī, *Aḥkām al-Jirāḥah*, pp. 320-331. The amazing thing here is that arguments over such a complicated operation took place as early as the first and the second Hijrī centuries (seventh and eighth AD), as was discussed by the heads of the various schools such as Abū Ḥanīfah, Mālīk, al-Shāfi‘ī and Aḥmad. See: Muhammad ‘Allīsh, *Mīnaḥ al-Jalīl*, (Cairo: al-Maṭba‘ah al-Kubrā al-‘Āmirah, 1294 A.H.), 1:321. Ibn Nujaym, *al-Ashbāḥ wal-Nazā‘ir*, 97.

changing therapeutic environment, and with the introduction of modern medical technologies. Collective *ijtihād* is one of the main means for these intellectual activities through workshops and conferences held by relevant institutions, such as *Majma' al-Fiqh al-Islāmī* (the Islamic Fiqh Academy) of the Muslim World League in Makkah. For example, amongst the issues discussed in the 10<sup>th</sup> session of this academy (held in Jeddah in 1987) was the removal of life-support instruments in case of a brain-death diagnosis, which was a hotly-debated issue. Likewise, abortion of a deformed foetus was an issue discussed in its 12<sup>th</sup> session (held in Makkah in 1990). Similarly, several pieces of research were presented on various issues concerning conjoined twins in the 20<sup>th</sup> session of the academy, held in Makkah in 2010.<sup>9</sup>

As stated elsewhere in this thesis, *al-qawā'id al-fiqhiyyah* are important in determining legal rulings for new issues. They provide *fiqh* with pragmatism and practicality to find solutions to novel issues. However, there are no particular *qawā'id*, which are specified to encompass medical issues exclusively; rather they are included within the remit of various *qawā'id*, whose general legal rulings are applicable to them. Nevertheless, through induction, medical issues have a strong presence within remit of the five universal *qawā'id* and many of their subsidiaries.

However, there is a question which has always been raised in *fiqh* literature regarding the legislative position of *qawā'id*. That is: can *qawā'id* be an independent source in deducing the rulings of *fiqh*? The following paragraphs will show the different views and arguments on this matter.

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<sup>9</sup> See: *Majallat al-Majma' al-Fiqhī al-Islāmī* (the journal of the Islamic Fiqh Council), Vol. 7, 1995, 369; Vol. 21, 2006, pp. 231-232 respectively.

## 5.2. Legislative Position of *Qawā'id*.

Most contemporary researchers who wrote on *qawā'id* held the view that *qawā'id* cannot be regarded as a source of the law, unless they themselves are based on a considered source, be it an agreed upon source, such as the Qur<sup>ʿ</sup>ān, the *Sunnah*, etc., or other sources, such as *istiḥsān*, *maṣlaḥah*, etc.<sup>10</sup> They most likely adopted the opinion of the committee of *Majallat al-Aḥkām al-ʿAdliyyah* on the matter. According to the *Mjallah*, the essential purpose of *qawā'id* is to facilitate a better understanding of the *Sharīʿah*; thus the judge should not base his judgment on any of them unless it is derived from either the Qur<sup>ʿ</sup>ān or the *Sunnah*.<sup>11</sup> In contrast, although there have no exclusive dedicated sections to discuss this matter in the traditional *qawā'id* works, some quotations of a number of scholars from different schools of law show that there have been two different views in this respect. While some maintain that a jurist must not rely on *qawā'id* to deliver a ruling unless they affirm and reiterate a ruling of the Qur<sup>ʿ</sup>ān or *Sunnah*,<sup>12</sup> some state that a judicial decision can be reversed if it contains a violation of the generally accepted *qawā'id*.<sup>13</sup>

According to those who oppose depending on *qawā'id* to deliver legal rulings (be they are in the past or the contemporary researchers), *qawā'id* are essentially the outcome of the detailed reading of *fiqh*, and that their main function is to consolidate the vast and, sometimes, unmanageable particulars of *fiqh* into brief inclusive principles and statements. To them, it is contrary to the logic to equalize between the *asl* (the fundament) and

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<sup>10</sup> Al-Bāḥusayn, *al-Qawā'id*, 265.

<sup>11</sup> Ḥaydar, *Durar al-Ḥukkam*, 1:10. Al-Zarqā, *al-Madkal*, 2:967. Zakariyah, *Application of Legal Maxims*, 61.

<sup>12</sup> Kamali, *Sharīʿah Law*, 142.

<sup>13</sup> Zakariyah, *Application of Legal Maxims*, 61.

the *thamarah* (the outcome), since *qawā'id* themselves are general legal rulings whose particulars have been derived from the different sources of law.<sup>14</sup> In addition, they argue, *qawā'id* through induction are not universal but rather commonly applicable to their particulars. Accordingly, because many issues are exempted from the sphere of application of most *qawā'id*, they cannot be regarded as a source of deducing legal rulings; for any source should be applicable to all of the particulars which have been derived from it.<sup>15</sup>

According to other scholars, on the other hand, *qawā'id* can independently be utilised in deriving legal rulings for the issues when there is no primary sources. They referred, to support their view to the famous letter of the Caliph ʿUmar ibn al-Khaṭṭāb to the judge of al-Baṣrah, Abū Mūsā al-Ashʿarī. ʿUmar in this letter instructed the judge, when making legal judgment for cases that have no clear legal determinations in the *Qurʾān* or the *Sunnah*, to ascertain their *amthāl* and *ashbāh* (similitudes and resemblances) that have legal determination and make *qiyās* (analogy) in order to reach to what he believes it is the best judgment.<sup>16</sup> Although this may be seen as a piece of evidence to the legality of *qiyās* as a source of law (which is not controversial), it is, a fortiori, a strong piece of evidence in favor of *qawā'id* to be so. If the nature of *qiyās* originally is to attach a single issue (which have no clear legal determination) to another single issue (whose legal status has already been determined by the *Qurʾān*, the *Sunnah*, etc.), the nature of *qawā'id* is stronger in this regard, as it is to

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<sup>14</sup> Al-Nadwī, *al-Qawā'id*, 294. Al-Būrṇū, *al-Wajīz*, 32.

<sup>15</sup> Al-Khalīfī, Riyād, *al-Qawā'id al-Fiqhiyyah: Hujjiyyatuhā*, 305.

<sup>16</sup> Al-Suyūṭī, *al-Ashbāh*, 6. Al-Nadawī, *al-Qawā'id*, pp. 74-75. Shubayr, *al-Qawā'id al-Kulliyah*, pp. 32-33.

attach a single issue to several other issues which have already had legal status.<sup>17</sup> As such, if the nature of *qawā'id* is seen stronger than *qiyās* in this respect, they should have preferred status over other *ijtihād* manifestations which have less consideration than *qiyās*, such as *istihsān*, *istiṣhāb*, *maṣlaḥah*, etc.

One, in fact, needs to harmonize between the two views. I think each of the two parties sees *qawā'id* from a different angle, and judges them accordingly. The actual use and function of *qawā'id* can significantly help in determining their legislative position. As such, *qawā'id* can be seen as general principles whose objective is to consolidate the vast and unmanageable particulars of *fiqh*. This can be demonstrated clearly when it comes to the already existed *fiqh* particulars. In contrast, the analogical nature of *qawā'id* is undoubtedly useful in extracting the legal rulings for new issues. Therefore, they can be seen of having dual functions. They are very similar, in this respect, to the proverbs, in a sense that both concepts are true with regard to their application on the already happened events and particulars on the one hand, and that they can embody under their remit whatever future events and particulars which are compatible to their idea on the other. Thus, to say that a jurist is not to rely on *qawā'id* to deduce a legal ruling for recent legal details denudes them totally of their use and makes the process of inferring and formulising them quite sterile.<sup>18</sup> In contrast, to say that they are independent source of law may not be accepted when considering their primary essence as general principles, whose legal status have been previously proved through one of the known

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<sup>17</sup> Al-Suyūṭī, *al-Ashbāh*, pp. 6-7. Al-Khalifī, *al-Qawā'id al-Fiqhiyyah*, 312.

<sup>18</sup> Al-Amiri, *Legal Maxims*, 75.

sources. Nevertheless, the matter can also be tackled from another consideration. Luqman Zakariya said in this respect:

“...we would like to submit that if a legal maxim is derived directly or indirectly from the texts, or from sound consensus or completed analogy, there is no doubt that it is sufficient to be used as basis of judgment. However, if it is obtained from a mere general reading of the details, then this kind of maxim needs to be endorsed by the schools. Moreover, if the maxim is peculiar to one school of law and does not enjoy the support of any other school, it is not enough to rely or base judgment on such maxim. Therefore, it is not totally acceptable for jurist and law practitioners to depend on these principles as a primary source of evidence or to use them solely as a proof, because the majority of those maxims have certain exceptions. Islamic jurists are enjoined firstly to give judgment on the basis of the primary source i.e. the Qurʾān, *Sunnah*, or *ijmāʿ*<sup>c</sup> before they can make use of *qawāʿid* independently. But if there is no primary source, then *qawāʿid* can be utilised.<sup>19</sup>

### 5.3. Relationship Between Medicine, Ethics and *Fiqh*

Generally speaking, medicine and *fiqh* are strongly intertwined. As such, similar to other areas of life, every single medical issue is subjected to the rulings of *fiqh*; i.e. each is categorized as either *wājib* (obligatory), *mandūb* (recommended), *mubāh* (permitted), *makrūh* (discouraged) or *ḥarām* (forbidden).<sup>20</sup> Furthermore, physicians need to know the legal rulings for medical practices, especially those that emerged in contemporary times before they involve themselves in them. Patients in turn ought to have adequate knowledge about legal decisions relating to their exceptional situations, such as ways of prayer specified for sick people, and *rukhaṣ* (concessions), which have been granted to them with

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<sup>19</sup> Zakariya, *Application*, 61.

<sup>20</sup> Al-Qarahdāghī and al-Muḥammadī, *Fiqh al-Qaḍāyā*, 106.

regard to *ṣiyām* (fasting), etc.<sup>21</sup> On the other hand, jurists need to consult doctors on the nature and features of, for instance, a particular disease or a treatment, or the actual situation of a particular patient, before they can issue a proper *fatwā* (legal opinion often expressed in a question / answer format).<sup>22</sup> For this reason, *fatwā* councils, such as council of the *Majma' al-Fiqh al-Islāmī* in Jeddah, usually host medical consultants in sessions specified to discuss medical issues.

Furthermore, as stated in the introduction of this chapter, medical issues have a strong presence within remit of the five universal *qawā'id* and many of their subsidiaries. It is remarkable that the concepts, which the five *qawā'id* represent (namely intention, certainty, removal of hardship, elimination of harm and custom) are mainly ethical. This reflects the relationship between medicine (both as a profession and treatment), law and morality in Islam. In this respect, *Shari'ah* is seen to be based on a system of morality and can, therefore, handle many moral problems that arise in medicine from a legal perspective.<sup>23</sup> Noel Coulson, describing the interrelation between law and medicine in Islam, said:

"The ideal code of behaviour, which is the *Shari'ah* has in fact a much wider scope and purpose than a simple legal system in the Western sense of the term. Jurisprudence (*fiqh*) not only regulates in meticulous detail the ritual practices of the faith and matters which could be classified as medical hygiene or social etiquette -legal treatises, indeed, invariably deal with these topics first; it is also a composite science of law and morality, whose exponents (*fuqahā'* sing. *Faqīh*) are the guardians of the Islamic conscience".<sup>24</sup>

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid., pp.107-108.

<sup>23</sup> See: Omar Hasan Kasule, *Medical Ethics from Maqasid Al Shari'a* at: (<http://islamthought.wordpress.com/2008/12/14/medical-ethics-from-maqasid-al-shari%E2%80%99a/>).

<sup>24</sup> Noel Coulson, *A History of Islamic Law*, (Edinburgh: Edinburgh University Press, 1964), p. 83.

A. Kevin Reinhart noted in this regard that 'Islamic law is more basic to Islamic ethics than is either Islamic theology or philosophy'.<sup>25</sup> Frederick S. Carney also wrote:

"...this largely because moral and legal acts are so intricately related in the *Shari'ah* to submission to God by contrast with a far greater autonomy from religion accorded morality and law in Christianity".<sup>26</sup>

This leads us to talk briefly about Islamic ethics pertaining to medicine. Ethics, in general, is a sub-branch of applied philosophy that is essentially related to morality, because it seeks to determine the good and the bad set of behaviours in a given circumstance. Medical ethics, in turn, is a subdivision of ethics that is concerned with moral principles, which relate to biomedical science in the clinical and investigational arenas.<sup>27</sup> It was defined as 'the moral principles, which should guide the members of the medical profession in the course of their practice of medicine and in relationship with their patients and other members of the profession'. It is a code of conduct for the member of the medical profession in order to render the best possible service to humanity and maintain the honour and dignity of the profession.<sup>28</sup>

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<sup>25</sup> A. Kevin Reinhart, "Islamic Law as Islamic Ethics", in: *The Journal of Religious Ethics*, Vol. 11, No. 2 (Fall, 1983), pp. 186-203, p. 186.

<sup>26</sup> Frederick S. Carney, "Some aspects of Islamic Ethics", in: *The Journal of Religion*, Vol. 63, No. 2 (Apr., 1983), pp. 159-174, at: 163.

<sup>27</sup> Aasim I. Padela, "Islamic Medical Ethics: a Primer", in: *Bioethics*, Vol. 21, No. 3, 2007, pp 169-178, p. 170.

<sup>28</sup> Talukder MHK, Nazneen R., Hossain MZ, JC Ishrat, "Basic Ideas on Medical Ethics", in: *Bangladesh Journal of Medical Science*, Vol. 9, No. 3, July 2010, pp. 131-135, p. 131.



Islamic ethics as a distinct genre does not exist. Material on ethics is scattered throughout various Islamic genres, such as *fiqh*, *tafsīr* (*Qurʾānic* exegesis) and *kalām* (theology).<sup>29</sup> Chapra (1992) said:

"Muslims derive their ethical system from the teachings of the *Qurʾān* ... and from the *Sunnah*... The goals of Islam are not primarily materialist. They are based on Islamic concepts of human well being and good life which stress brotherhood / sisterhood and socio economic justice and require a balanced satisfaction of both the material and spiritual needs of all humans".<sup>30</sup>

However, *taṣawwuf* (Sufism) is seen as the genre, which promotes ethics and conduct for individuals and societies. As such, its function is:

"to purify the heart from the lowly bestial attributes of lust, calamities of the tongue, anger, malice, jealousy, love of the world, love of fame, niggardliness, greed, ostentation, vanity, deception, etc. At the same time it aims at the adornment of the heart with the lofty attributes of repentance, perseverance, gratefulness, fear of Allah, hope, abstention, *tauheed*, trust, love, sincerity, truth, contemplation, etc".<sup>31</sup>

There are two terms, which were used to refer to ethics and morality within Islamic intellectual thought, namely *adab* and *akhlāq*. *Akhlāq* is derived from the root (*khalaqa*), which means 'to create', signifying innate qualities, and is used to mean morality or character. The term *adab*, on the other hand, has wider meanings in Islamic intellectual thought, and has

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<sup>29</sup> A. Siddiqui, "Ethics in Islam: Key Concepts and Contemporary Challenges", in: *J Moral Education*, Vol. 26, No. 4, 1997, pp. 423-431, p. 424.

<sup>30</sup> See: Gillian Rice "Islamic Ethics and the Implications for Business", in: *Journal of Business Ethics*, Vol. 18, No. 4 (Feb., 1999), pp. 345-358, p. 346.

<sup>31</sup> See: Khalid Baig, *What is Tasawwuf?*, at:  
([http://www.albalagh.net/general/what\\_is\\_tasawwuf.shtml](http://www.albalagh.net/general/what_is_tasawwuf.shtml)).

developed into a specific genre within Arabic literature. *Adab* represents the ‘linking of learning and knowledge to right and appropriate human conduct, which is the foundation of the human personality’. In modern parlance, the relation between *adab* and *akhlāq* is that *adab* literature refines *akhlāq*.<sup>32</sup>

Islamic medical ethics in turn has never been discussed as an independent field of ethics, although topics such as sexuality, birth control and abortion have been discussed by scholars with regard to their social and ethical considerations<sup>33</sup>. Some of the issues which were discussed in this regard are universal, such as abortions, organ transplants, artificial insemination, cosmetic surgery, doctor-patient relations, etc., while other issues are typically Islamic, such as impediments to fasting in Ramadan, diseases and physical conditions that cause infringement of the state of purity, medicines containing alcohol, etc.

Medical ethics in Islam is tied to Islamic law, and is inseparable from the religion itself.<sup>34</sup> As such, there are, in general, two main ethical principles, which Islam focuses on with regard to medicine, namely 1) the emphasis on the sanctity of human life; the *Qurʾān* says: “whosoever saves a human life, saves the life of the whole mankind”.<sup>35</sup> 2) The emphasis on seeking a cure, which derives from a saying of Prophet Mohammad

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<sup>32</sup> Maḥfūd ʿAzzām, *al-Akhlāq fī-l-Islām*, First Edition, (Cairo: Dār al-Hidāyah, 1986), pp. 11-13. Aasim I. Padela, "Islamic Medical Ethics: a Primer", in: *Bioethics*, Vol. 21, No. 3, 2007, pp 169–178, p. 170.

<sup>33</sup> See for birth control: Yūsuf Al-Qarḍāwī, *al-Ḥalāl wal-Ḥarām Fil-Islām*, 22<sup>nd</sup> Edition, (Cairo, Maktabat Wahbah, 1997), pp. 175-178. For abortion, see: Ibrāhīm Muḥammad Raḥīm, *Aḥkām al-Ijḥād fīl-Fiqh al-Islāmī*, First Edition, (Manchester, Publications of Majallat al-Ḥikmah, 2002), pp. 63- 76. For sexuality, see: Muḥammad Yāsīn, *Ratq Ghishāʾ al-Bakārah fī Mīzān al-Maqāṣid al-Sharʿiyyah* at: <http://majles.alukah.net/showthread.php?t=15874>

<sup>34</sup> Ibid., 171.

<sup>35</sup> *Sūrat al-Māʾidah*: 32.

(PBUH), "Allah has sent down the disease and the cure, and has made for every disease the cure. So treat sickness...".<sup>36</sup> Further, any medical action must fulfill one or more of the purposes of the *Sharī'ah*, if it is to be considered ethical, i.e. preserve religion, life, progeny, intellect, and wealth.<sup>37</sup> Moreover, some of the rules of Islamic medical ethics are also *qawā'id fihiyyah*. For example: 1) "*al-darūrāt tubīh al-mahẓūrāt*" (necessity overrides prohibition); i.e. if there are certain items which are prohibited, under dire necessity they can become permissible. 2) "*al-maṣlaḥah al-ʿāmmah tuqaddam ʿalā al-maṣlaḥah al-khāṣṣah*" (public interest overrides the individual interest). 3) "*al-darar yudfaʿ qadra al-imkān*" (harm has to be removed at every cost if possible).<sup>38</sup>

There is, however, a substantial amount of writing from the classical era on ethics as they relate to the medical field. The earliest surviving Arabic work on medical ethics is *Adab al-Tabīb* (the Conduct of a Physician) by Ishāq ibn ʿAlī al-Ruhāwī, who lived sometime in the second half of the third / ninth century and practiced in the city of Ruhā, southeastern Turkey. The author stated that the motivation for compiling his treatise was 'to elevate the practice of medicine in order to aid the ill and to enlist the aid of God in His support vocationally and otherwise'. He regarded physicians as "guardians of souls and bodies" and He called medicine a divine art. A glance at the titles of the chapters of the book provides a general picture of the content. For example, the title of chapter one is: the loyalty and the faith of the physician, and ethics he must follow to improve

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<sup>36</sup> Talukder & others, "Basic Ideas on Medical Ethics",133.

<sup>37</sup> See: *Islamic Medical Ethics* at: (<http://www.isna.net/Leadership/pages/Islamic-Medical-Ethics.aspx>).

<sup>38</sup> Talukder & others, "Basic Ideas on Medical Ethics",133.

his soul and morals. Chapter three is about what the physician must avoid and be aware of. Chapter twelve is on the dignity of the medical profession. Chapter nineteen's title is harmful habits.<sup>39</sup> The book is edited by Kamāl al-Sāmarrāʾī and Dawūd Salmān ʿAlī and published in 1992 in Beirut by Dār al-Shuʿūn al-Thaqāfiyyah al-ʿĀmmah.<sup>40</sup>

However, the relationship between medicine and ethics is also present in all developed cultures of the ancient and medieval world as well as in modern Western civilization. For example, general piety and sincerity in the character of a physician were emphasized by Greek medical persons, who were considered custodians of both body and soul. Furthermore, in ancient Egypt, Persia and India, medicine was a part of religion or very closely related to it.<sup>41</sup> For modern Western civilisation, there are four basic ethical principles, which have presence in the medical profession, namely: autonomy, non-maleficence, beneficence and justice.<sup>42</sup> However, application of the above principles requires ethical rules. These ethical rules may be substantive rules, authority rules, or procedural rules. The substantive rules deal with veracity, confidentiality, privacy, and fidelity. The authority rules deal with surrogacy, professional authority, and rationing. The procedure rules are specific on procedures to be followed.<sup>43</sup>

In the following pages, the discussion will be on the application of *al-qawāʿid al-fiqhiyyah* to six medical issues, which have been carefully

<sup>39</sup> Muhammad Kāmil Jād, *Adab al-Ṭabīb li-l-Ruhāwī*, at: (<http://www.albayan.ae/sports/1129451609895-2005-10-26-1.111012>). See also: Sharif Kaf al-Ghazal, "Medical Ethics in Islamic History at a Glance", in: *JISHIM (Journal of the International Society for the History of Islamic Medicine)*, Vol 3, 2004, pp. 12-13, .

<sup>40</sup> See: (<http://www.neelwafurat.com/itempage.aspx?id=lbb146644-108023&search=books>)

<sup>41</sup> Fazlur Rahman, *Health and Medicine in the Islamic Tradition*, (New York: the Crossroads Publishing Company, 1987), 91.

<sup>42</sup> Beauchamp and Childress. *Principles of Biomedical Ethics*, (Oxford: Oxford University Press 1979), 1994.

<sup>43</sup> See for more details: Omar Kasule, *Medical Ethics from Maqasid Al Shariʿa*.

selected as study cases to show how *qawā'id* are very useful in the determination of the legal ruling. Each case will be treated from different aspects; thus more *qawā'id* will be presented accordingly. Although the five universal *qawā'id* and their subsidiaries have a very remarkable presence, other *qawā'id* will also be there when applicable. For the purpose of more illustration, various point of views and argumentations of the different parties will also be stated. It worth mentioning in this context I have shown in the introduction of the thesis the reasons behind the selection of these issues in particular (refer to section I.3. above).

#### **5.4. The Profession of Medical Practice.**

As stated in the introduction of the thesis, this is not, generally speaking, a contemporary issue, because this profession is known and practiced in almost every age and place. What is new is that the profession needs new considerations in some areas, in order to be practiced in a proper manner. Further, there are new circumstances associated with this profession, whose legal rulings should be determined.

As such, the provision of medical practice is, as mentioned above, *farḍ kifāyah*. However, jurists have distinguished between learning and practicing medicine. The former, according to them, is *farḍ kifāyah*, as it is a necessity for the Muslim community to have amongst them some persons who should master medicine. The legal ruling of practicing medicine, on the other hand, varies according to the situation in the society, and to the person's intention. Accordingly, practicing medicine essentially falls under

the category of *mubāḥ*; yet it can be elevated to fall under the category of *mandūb* or *wājib*. It becomes *mandūb* when one's intention is to help others in need, or to respond to the general call of the Prophet (PBUH) to benefit other people in a *ḥadīth*, which says: "He who is competent amongst you to benefit his brother should do so".<sup>44</sup> It can be *wājib* upon those who learned medicine when they sign a contract with the authorities to practice medicine, or that there was a pressing need for their profession, in case there is a shortage of doctors, or when medical intervention is necessary in order to save lives, as in the contemporary cases of car accidents and industrial injuries.<sup>45</sup> On the other hand, learning and practicing medicine can also be *ḥarām* for a person with ill-intention, or malevolence, such as intending to be involved in illegal actions, like engaging in organ theft, or to operate surgeries, which contemporary scholars unanimously agreed are unlawful, like surgeries for sex reassignment.<sup>46</sup>

Therefore, intention plays a remarkable role in determining the proper legal status of the profession of medical practice. Accordingly, when the intention is to help others, which is very valued in Islam, medical practice is a means to God's pleasure and blessing, but when it is to harm others, it is then prohibited. This is in accordance with the first universal *qāʿidah*, which reads: *al-umūru bi-maqāṣidihā* (meaning that matters are judged in light of the intention behind them). Harming others, on the other

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<sup>44</sup> Al-Bukhārī, *al-Ṣaḥīḥ*, Book 26, Number 5452: *Kitāb al-Salām* (the book on salutations and greetings).

<sup>45</sup> *Al-Mawsūʿah al-Fiqhiyyah*, 12:135.

<sup>46</sup> Al-Qarahdāghī and al-Muḥammadī, *Fiqh al-Qaḍāyā al-Ṭibbiyyah*, 104. Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, 202.

hand, is prohibited and must be stopped. The fourth universal *qā'idah* says in this regard: "*al-dararu yuzāl*", which means (harm must be eliminated).

However, intention is a hidden matter; thus, good or ill intention is relevant to morality and religiosity. Therefore, ill intention may not have judicial consequences unless the person concerned was really involved in prohibited actions, such as those mentioned above and the like. The judicial rule, in this context, is that no action is to be taken against a person's intention to commit a crime, although intention may play a major role in determining the extent of the penalty in the *ta'zīr* kind of punishments.<sup>47</sup> In this context, the physician is legally liable for any injury caused to the patient in case of deliberate malpractice, such as prescribing inappropriate medication or carrying out an unnecessary operation just for the purpose of gaining money, or that he intentionally seeks to injure the patient, etc.<sup>48</sup> A doctor is obliged to provide indemnity for any harm caused, and could be subjected to criminal proceedings in response to his evil intention.<sup>49</sup> The *qā'idah* says in this respect: "*al-aşlu al-mu'āmalatu bi-naqīdi al-qaşdi al-fāsid*", which means: (the rule is that in the case where the intention is proven to be fraudulent the result is that the converse is to apply). It is expressed in other wordings, as follows: "*man ista'jala shay'an qabla awānihi 'ūqiba 'alayhi bi-ḥirmānih*" (any person, who hastens the accomplishment of a thing before its due time, is punished by being

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<sup>47</sup> See: Ahmad Faṭḥī Bahnasī, *al-Mas'ūliyyah al-Jinā'iyyah Fil-Fiqh al-Islāmī*, Fourth Edition, (Cairo: Dār al-Shurūq, 1988), pp. 72-73.

<sup>48</sup> Al-Shinqītī, *Aḥkām al-Jirāḥah*, pp. 443-446. See also: Faṭḥallah, Wasīm, *al-Kaṭa' al-Ṭibbī Maḥmūm wa-Athāruh* at: (<http://www.saaaid.net/tabeeb/65.htm>).

<sup>49</sup> See: Hamza Yusuf Hanson, *Principles of Islamic bioethics* at: ([http://www.radcliffe-oxford.com/books/samplechapter/8129/Sheikh\\_chpt%2004-51127780rdz.pdf](http://www.radcliffe-oxford.com/books/samplechapter/8129/Sheikh_chpt%2004-51127780rdz.pdf)).

deprived thereof).<sup>50</sup> According to some contemporary researchers, deliberate malpractice or ill-intention of a doctor does not, however, need to be proved by a particular number of witnesses or the like; instead, reports from a neutral specialised committee would be sufficient. The *qā'idah* says in this context: “*al-thābitu bil-burhāni kal-thābiti bil-ʿayān*” (a thing established by proof is equivalent to a thing established by visual inspection).<sup>51</sup>

Unskilled or incompetent doctors are to be expelled from practice for the sake of saving the community from expected harm, although this procedure may have bad consequences on the doctors and prevent them from prescribed advantages. The *qā'idah* says in this regard: “*yutaḥammalu al-ḍararu al-khāṣṣu li-dafʿi ḍararin ʿām*”, which means: (a private injury is tolerated in order to ward off a public injury).<sup>52</sup> The expulsion of incompetent doctors takes effect even if they have practiced over the long term, as the *qā'idah fiqhiyyah* indicates: “*al-ḍararu lā yakūnu qadīman*” (injury having existed in the past does not justify its continuation).<sup>53</sup>

On the other hand, a surgeon or a doctor is totally free from any legal liability if the situation of the patient worsened after the surgery or treatment, as long as he (the surgeon or doctor) adheres to the medical

<sup>50</sup> Ali al-Maṭrūdī, *Taṭbīq al-Qawā'id al-Fiqhiyyah ʿAlā Masā'il al-Ṭibbiyyah*, (unpublished paper submitted to *Nadwat Taṭbīq al-Qawā'id al-Fiqhiyyah ʿAlā al-Masā'il al-Ṭibbiyyah*), Riyadh, Saudi Arabia in 1429 A.H. (2008), 14.

<sup>51</sup> ʿAbd al-Salām Al-Ḥaṣīn, *Taṭbīq al-Qawā'id al-Fiqhiyyah ʿAlā Masā'il al-Takhdīr al-Muʿāṣirah*, (unpublished paper submitted to *Nadwat Taṭbīq al-Qawā'id al-Fiqhiyyah ʿAlā al-Masā'il al-Ṭibbiyyah*), Riyadh, Saudi Arabia in 1429 A.H. (2008), 48.

<sup>52</sup> Haydar, *Durar al-Ḥukkām*, 1:36. Al-Būrnū, *al-Wajīz*, 263.

<sup>53</sup> Al-Ḥaṣīn, *Taṭbīq al-Qawā'id al-Fiqhiyyah ʿAlā Masā'il al-Takhdīr*, 37.



methods and rules in carrying out operations and prescribing medication.<sup>54</sup> The *qā'idah* says: “*al-jawāzu al-shar'īyyu yunāfi al-ḍamān*”, which means: (legal permission is incompatible with liability); i.e. an act allowed by the law cannot be made the subject of a claim to compensation.<sup>55</sup>

*Fuqahā'* have engaged on a detailed discussion on the gender and religion of the doctor to treat a patient from another gender or religion. It seems that they consider the gender of the doctor more than considering his / her religion. Accordingly, a female is not to be treated by a male doctor in the availability of a female doctor, regardless of being Muslim or non-Muslim (and equivalently a male patient is not to be treated by a female doctor in the availability of a male doctor regardless of being Muslim or non-Muslim).<sup>56</sup> Although this might be possible in the past and in private clinics in our time, it does not seem possible in practice in hospitals; according to the laws governing hospitals, a doctor cannot refuse to see certain patients, just because of their gender, unless female doctors choose to work in branches like obstetrics and gynaecology or paediatrics. Besides, in many Muslim countries, there is still an insufficient number of specialized female doctors in many fields, especially in general surgery. In order to make this practical in all health institutions, a number of policies should be adopted, and a series of projects should first be achieved. However, according to the *fuqahā'*, a patient to be treated by a doctor from the same gender is subjected to three conditions; namely: first, the doctor

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<sup>54</sup> Muhammad Ṭalāfḥah, “Qā'idat al-Jawāz al-Shar'ī Yunāfi al-ḍamān Wataṭbiqātuhā fīl-Fiqh al-Islāmī wal-Qānūn”, in: *Al-Majallah al-Urduniyyah fīl-Dirāsāt al-Islāmiyyah*, Vol. 2, No. 4 (al-Mafraq - Jordan -, 2006), 207.

<sup>55</sup> Al-Zarqā, *al-Madkhal al-Fiqhī*, 2:1035. Ismā'īl, *al-Qawā'id al-Fiqhiyyah*, 210. Hooper, “The Mejelle. Articles 1-100”, 379.

<sup>56</sup> *Al-Mawsū'ah al-Fiqhiyyah*, 12:137.

from the same gender is easily available; second, one is satisfied of his / her medical treatment, and third, there is no other valid legal excuse for not resorting to his / her treatment.<sup>57</sup> Some Shāfiʿī scholars stated that the point should be how skilful is the doctor; thus the treatment and examination should be done by *al-ṭabīb al-māhir* (a skilled doctor), regardless of being male or female, Muslim or non-Muslim. They also stated that it is for the patient to be treated by a doctor, who charges less than the going rate, regardless of being Muslim or non-Muslim.<sup>58</sup>

In the absence of a doctor of the same gender, the patient can be treated by a doctor from the other gender. This situation falls, according to the jurists under the concept of *ḍarūrah*, and the *qāʿidah* says: “*al-ḍarūrātu tubīḥu al-maḥḍūrāt*” which means: necessities override prohibitions. The situation is also considered as *ḍarūrah* in those matters where the treatment is urgent and cannot be delayed, as in the cases of traffic accidents and the like.<sup>59</sup>

However, according to another *qāʿidah*, which says, “*al-ḍarūratu tuqaddaru bi-qadarihā*”, which means: (necessity is determined by the extent thereof), jurists say that when it is possible to treat the illness by only listening to the patient describing the situation, it is not allowed for the doctor to touch or look at the patient; and if the treatment can be done

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<sup>57</sup> Although these conditions were mentioned for a female patient who seeks treatment from a male doctor, it can also be for the male patient seeking treatment from a female doctor. See: *Women Seeking Medical Treatment From Male Doctors* at:

(<http://www.shariahprogram.ca/islam-qa-women/medical-treatment-male-doctors.shtml>).

<sup>58</sup> *Al-Mawsūʿah al-Fiqhiyyah*, 12:137 and pp. 40: 366-369.

<sup>59</sup> See: *Female Doctor Treating Men*, at: (<http://islamqa.com/en/ref/20460>).

by just looking without touching the body, then touching is not permissible. In addition, both the doctor and the patient should not be in *khalwah* (impermissible seclusion); rather the treatment should be in the presence of a third person, who should also be a *maḥram* (close relative to the patient), a husband or a trusted woman, such as a nurse in our contemporary time.<sup>60</sup>

However, the presence of a *maḥram* or a third party seems difficult to be achieved in many situations in our time. For example, in many cases, the regulations of the care units oblige that the rooms should be confined to the patients and the doctors solely. Likewise, a patient in critical situations caused by traffic accidents, factory injuries, and the like is to be treated by a doctor in charge, regardless of their gender, and cannot be delayed until the *maḥram* is present. Such circumstances, in accordance with the concept of *darūrah* according to the *qāʿidah*, override prohibition.

The question here is what if a doctor from the same gender becomes easily available, and that he / she is skilled at treating the particular case of illness, should the patient then continue with the previous doctor, or should he start with the new one? One here can initially mention two *qawāʿid fiqhiyyah*, which indicate that the patient in this case should seek treatment from the new doctor. The first says: “*mā jāza li-ʿudhrin baʿala bi-zawālīh*”, which means: (whatever is permissible owing to some excuse, ceases to be permissible with the disappearance of that excuse), and the other says: “*idhā zāla al-mānī<sup>c</sup> ʿāda al-mamnū<sup>o</sup>*”, which means: (when a

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<sup>60</sup> Al-Qarahdāghī and al-Muḥammadi, *al-Qaḍāyā al-Ṭibbiyyah al-Muʿāṣirah*, pp. 528-529. See also: *Can a Male Doctor See Female Patients?* at: ([http://qa.sunnipath.com/issue\\_view.asp?HD=3&ID=14371&CATE=473](http://qa.sunnipath.com/issue_view.asp?HD=3&ID=14371&CATE=473)).

prohibition is removed the thing to which such prohibition attaches reverts to its former status of legality). Yet, it should be observed that it might be difficult for a patient to follow the treatment with another doctor in the case where the treatment lasted for a long time and that the old doctor already has full background on the situation of the patient, and, based on that, follows the progress of the illness or the cure. The situation requires ease and facility, and can subsequently be within the remit of the third universal *qā'idah* which reads: "*al-mashaqqatu tajlibu al-taysir*", which means: (difficulty begets facility).

While performing their duty, a doctor or surgeon may come across some situations, which need to be clarified in terms of their legal rulings. In this context, three different situations have been presented, where reference has been made to *al-qawā'id al-fiqhiyyah* to make legal rulings more comprehensible.

1. It is known that *satr al-awrah* (covering the intimate parts of the body) for both men and women is an obligation in Islam, and these should not be exposed except to the other spouse. However, for the purpose of treatment and when it is necessary, scholars in the past and present say that a physician is allowed to look at hidden and private parts of the body of his patient.<sup>61</sup> The gender and religion of the doctor and patient in this issue is subject to the availability and competence, as shown above. Nevertheless, *fuqahā*<sup>2</sup> stated that if the looking of a female nurse on the body of a female patient is sufficient for a diagnosis of the illness, the male doctor is not

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<sup>61</sup> Hasan al-Sayyid Khaṭṭāb, *Qā'idat al-Darūrāt Tubīḥ al-Maḥdūrāt Wataṭbīqātuhā al-Mu'āṣirah fil-Fiqh al-Islāmī*, in: (Majallat al-Uṣūl wal-Nawāzil), Vol. 2, 1430 A. H., pp. 210-211. See also: *Al-Mawsū'ah al-Fiqhiyyah*, 12: 136.

then allowed to look at the patient's private parts.<sup>62</sup> This goes under the abovementioned *qā'idah*, which says: "*al-ḍarūratu tuqaddaru bi-qadarihā*" (necessity is determined by the extent thereof).

2. Performing *ṣalāh* in its prescribed times is obligatory, and any delay without a real excuse is *ḥarām*. However, it often happens that a surgery may last for a few hours, so that the surgeon cannot perform prayer at its due time. If we consider that the time of carrying out operations is usually fixed in hospitals, a surgeon has no choice to adjust the time of the operations to suit prayer times. In addition, a surgeon, while conducting an operation, cannot leave the patient for the purpose of performing prayer, as it may be very dangerous and the patient may die. According to the Saudi Permanent Committee for *Iftā'*, if not possible to take turns with other fellows, it is permissible for the surgeon to combine two prayers at the time of the earlier or the later one, such as performing *ẓuhr* (noon) and *‘aṣr* (afternoon) together at the time of either of them. If this is not possible, it is then permissible for the surgeon to delay prayer to be made up after finishing the operation. This is out of difficulty and necessity. The *qawā'id* say in this regard: "*al-mashaqqatu tajlibu al-taysīr*" and "*al-ḍarūrātu tubīḥ al-maḥḍūrāt*" respectively.<sup>63</sup>

3. In case of dispute between a patient and a doctor over the amount of the treatment charge, scholars say reference should be to the *‘urf* (custom). The fifth universal *qā'idah* says in this regard: "*al-‘ādatu muḥakkamah*", which

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<sup>62</sup> Ibid., 12:137.

<sup>63</sup> See *fatwā* No.20913 of the Saudi Permanent Committee for *Iftā'*: Delaying *Ṣalah* by a Surgeon During Performing Surgery, at: (<http://www.alifta.net/Fatawa/FatawaChapters.aspx?View=Page&PageID=69&PageNo=1&BookID=17>).

means: (custom is authoritative); i.e. custom can be the basis of judgement when there is no *naṣṣ* on that particular issue. However, due to the fact that treatment and medication charge in our modern time is usually fixed and prescribed by the local authorities of the different countries, dispute over the charge can be imagined in few situations. It may happen in rural areas in some countries where people refer to local doctors for treatment and medication. It can also happen in urban areas when there might be some confusion over whether the cost of usage of electronic devices in the illness diagnosis is included in the overall charges or not. In this case, reference to the *ʿurf* of the clinics can provide a satisfying solution for all.<sup>64</sup> There is a specific *qāʿidah*, in this regard, which is very beneficial, although it mentioned merchants in particular. It says: “*al-maʿrūfu bayna al-tujjāri kal-mashrūʿi baynahum*” (A matter recognised customary amongst merchants is regarded as if agreed upon between them).

## 5.5. Abortion

The right to life is guaranteed and protected by law perhaps in all legal systems, be they religious, customary, secular, etc. Article 2 of the European Convention on Human Rights, for example, declares that:

“Everyone’s right to life shall be protected by law.  
None shall be deprived of his life intentionally save in  
the execution of a sentence of a court following his

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<sup>64</sup> Ali al-Maṭrūdī, *Taṭbīq al-Qawāʿid al-Fiqhiyyah ʿAlā Masāʾil al-Ṭibbiyyah*, (unpublished paper submitted to *Nadwat Taṭbīq al-Qawāʿid al-Fiqhiyyah ʿAlā al-Masāʾil al-Ṭibbiyyah*), Riyadh, Saudi Arabia in 1429 A.H. (2008), 57.

conviction of a crime for which this penalty is provided by law”.<sup>65</sup>

Likewise, the foremost aim of the *Sharī'ah* is protecting human life after protection of religion in the context of *al-darūriyyāt al-khams* (the five necessities). In the Qur'an, it is clearly stated: “And do not kill the soul (i.e. person) – which Allah has forbidden – except for a just cause”.<sup>66</sup>

The question is: when does the life of a human begin biologically? Determining the start of personhood is critical, as it would determine the legal status of many acts, such as abortion and homicide. Apparently, the question about the exact timing of the start of personhood is a controversial issue. Many thought life begins at conception, others say it is at cell division, whereas a third group think it is during childbirth, etc.<sup>67</sup>

In Islam, the foetus is believed to become a living soul after four months of gestation. This is based on a *ḥadīth* reported by Al-Bukhārī and others, which says:

“(The matter of the creation of) a human being is put together in the womb of the mother in forty days, and then he becomes a clot of thick blood for a similar period, and then a piece of flesh for a similar period. Then Allah sends an angel who is ordered to write four things. He is ordered to write down his (i.e. the new creature's) deeds, his livelihood, his (date of) death, and whether he will be blessed or wretched (in religion). Then the soul is breathed into him”.<sup>68</sup>

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<sup>65</sup> Douwe Korff, *A Guide to the Implementation of Article 2 of the European Convention on Human Rights*, First Edition, (Council of Europe, 2006), 4.

<sup>66</sup> *Sūrat al-Isrā'*: 33.

<sup>67</sup> See: *When Does Human Personhood Begin? Conflicting Belief System.* at: ([http://www.religioustolerance.org/abo\\_when2.htm](http://www.religioustolerance.org/abo_when2.htm)).

<sup>68</sup> Al-Bukhārī, *al-Ṣaḥīḥ*, Book 54: Beginning of Creation, 4:430.

Nevertheless, *fuqahā*<sup>69</sup> say that a foetus has *ahliyyat wujūb* (legal personality) from conception and can, subsequently, enjoy certain rights; namely: *nasab* (family name), *mīrāth* (inheritance), *waṣiyyah* (bequeathed will) and *waqf* (endowments), even though it applies when it is delivered alive.<sup>69</sup> This legal personality is described as *nāqīṣah* (restricted) due to the fact that the foetus is subject to both possibilities of life and death.<sup>70</sup> Moreover, a foetus, based on presumed living status, can enjoy the right of compensation in case of a crime committed against its mother, which affected it.<sup>71</sup>

Thus, according to the *fuqahā*<sup>72</sup>, a foetus must be protected from whatever might harm it. This can be manifested in a number of cases as examples. As such, the mother is allowed to break the fast if fasting will badly affect the baby to be. Moreover, in case of *al-ṭalāq al-bāʿin* (irrevocable divorce), a husband must provide *nafaqh* (maintenance) to his pregnant ex-wife until she delivers the baby, which is not the case if she is not pregnant. Furthermore, in case a pregnant woman is convicted of a crime, and sentenced to execution provided by law, the implementation of the sentence must be delayed not only until birth, but until weaning.<sup>72</sup> This is true even when the pregnancy is a result of illegal sex.<sup>73</sup>

Having said this, is abortion, which is an interruption of pregnancy, considered a violation of the right to life; thus it is not permissible? It is an

<sup>69</sup> Al-Zarqā, *al-Madkhal*, pp. 2:791-792. Zaydān, *al-Wajīz fī Uṣūl al-Fiqh*, pp. 94-95.

<sup>70</sup> Mahdi Zahraa, *Legal Personality in Islamic Law*, in: (Arab Law Quarterly, Vol. 10, No.3, 1995, pp. 193-206), 194.

<sup>71</sup> Ibid.

<sup>72</sup> Abdullah Al-Khirashī, *Sharḥ Mukhtaṣar Khalīl*, (Cairo, al-Maṭbaʿah al-Kubrā al-Amīriyyah, 1317 A.H.), 8:25. Ibn Qudāmāh, *al-Mughnī*, 8:172. Ibrāhīm Muhammad Raḥīm, *Aḥkām al-Ijḥād fīl-Fiqh al-Islāmī*, First Edition, (Manchester, Publications of Majallat al-Hikmah, 2002), pp. 63- 76.

<sup>73</sup> Muhyī al-Dīn al-Nawawī, *Shah Ṣaḥīḥ Muslim*, 11:202.



old, but living topic for debate and disputation, as many new conditions relate to foetal life have been examined in order to determine the appropriate legal rulings. As such, books of *fiqh* have dealt with abortion on a considerably wide scale. It is usually discussed in different contexts, such as in the books of fasting, *ʿidah* (waiting period), marriage, *diyyah* (blood money), etc. For example, in instructing mothers not to fast if, as mentioned above, fasting would badly affected the foetus. Indeed, *fuqahāʾ* say that in case it is aborted because of fasting, the mother is obliged to pay a *diyyah* (blood money), and she is not entitled to have a share in the foetus's inheritance, if she previously knew that fasting would lead to abortion.<sup>74</sup> However, the legal status of abortion varies according to the nature of the foetus, the process of foetal development, and the point at which the foetus is considered a human being.<sup>75</sup> The contemporary therapeutic environment and the introduction of modern medical technologies have a remarkable impact in further elucidating the different situations of the mother and the foetus, and, subsequently, in determining the proper legal ruling for every situation. The following is a detailed presentation on the matter, which will essentially include the role of *al-qawāʿid al-fiqhiyyah* in this regard. However, the presentation here will only be on the deliberate termination of a pregnancy before normal childbirth; i.e. the type of abortion caused intentionally by consuming certain drugs or surgery, regardless of the motivations. Thus, unintentional abortion (such as that resulting from an

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<sup>74</sup> Al-Shāfiʿī, *al-Umm*, First Edition, (Cairo, Dār al-Wafāʾ, 2001), 7:268. Ibn Qudāmah, *al-Mughnī*, 12:81. This, however, should not contradict what has been stated above that the right of inheritance applies when a foetus is delivered alive, because it is given a presumed living status in case of a crime that affected it. See: Al-Zarqā, *al-Madkhal*, 2:793 (footnote 3).

<sup>75</sup> See: Saʿdiyya Shaikh, *Family Planning, Contraception and Abortion in Islam*, at: ([http://www.religiousconsultation.org/family\\_planning\\_in\\_Islam\\_by\\_Shaikh\\_p4.htm](http://www.religiousconsultation.org/family_planning_in_Islam_by_Shaikh_p4.htm)).

error by the mother or doctor, or out of a criminal act against the mother or the foetus) will not be dealt with.

Abortion essentially is either for a good reason or not, and is either before *rūḥ* (soul) is blown into the foetus or after. These different situations are essential components in determining the legal status of abortion.

If abortion is not for a good reason, rather stems from a desire to keep the elegance of the mother's body, or for birth control, it is either before *rūḥ* (soul) is blown into the foetus or after. For the former, the *fuqahā'* adopted different positions. The majority of the Mālikīs and some scholars of other schools, such as al-Ghazālī, ibn Rajab, and ibn Taymiyyah, adopted a strict position against it from the first moment of conception.<sup>76</sup> Al-Ghazālī considered it as *jināyah* (a crime), and said that the crime is more serious with the progression of pregnancy.<sup>77</sup> In contrast, the majority of scholars held the view that it is allowed for the mother to abort the foetus in the first forty days of pregnancy (at the stage of sperm), while it is not allowed after this stage.<sup>78</sup> They thought, based on some *nuṣūṣ*, that a foetus is not yet formed into a human image, while in the sperm stage, and therefore aborting it does not amount to killing it. On the other hand, the formation of a foetus into a human image, according to them, starts after the sperm stage; thus, abortion is no longer permissible.<sup>79</sup> Some scholars adopted a middle position, and said that abortion before 120 days of pregnancy is *makrūh*, if both spouses agree and a trusted physician has advised that such

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<sup>76</sup> Muhammad Raḥīm, *Aḥkām al-Ijḥād fil-Fiqh al-Islāmī*, 265.

<sup>77</sup> Al-Ghazālī, *al-Iḥyā'*, 2:58.

<sup>78</sup> Muhammad Raḥīm, *Aḥkām al-Ijḥād*, 287; 303.

<sup>79</sup> Ibid., 305; pp. 308-315.

abortion will have no bad consequences on the mother.<sup>80</sup> Each of the views has been supported by a number of *nuṣūṣ* from the Qur<sup>ʿ</sup>ān and / or the *Sunnah*, and / or other evidence. The presentation here will be confined only to the usage of *al-qawāʿid al-fiqhiyyah* in the argumentations to support the different views where applicable.

As such, a number of *qawāʿid fiqhiyyah* have been used to support the view of those who are totally against abortion. First, “*al-umūr bi-maqāṣidihā*”, referring to intention for determining the legal status of abortion, as intention is always deemed an essential component in this regard. As such, the intention to keep the elegance of the mother’s body is not a good reason for the mother to abort what is in her womb, since, according to them, life begins once the semen from a man fertilised an ovum from a woman, and went into the womb of the mother; thus, attacking the ejected sperm would prevent the formation of a human being.<sup>81</sup> Likewise, intention is also crucial in prohibiting abortion for birth control or for economic reasons, such as fear of poverty and inability to feed a child.<sup>82</sup> For birth control, it can be practiced using various methods of contraception before ejecting the sperm into the womb of the mother.<sup>83</sup> Abortion for economic reasons, on the other hand, is condemned in Islamic law in the same way and for the same reasons as infanticide.<sup>84</sup> The Qur<sup>ʿ</sup>ān says in this regard: “Kill not your children for fear of want: We shall provide sustenance

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<sup>80</sup> Ibid., 283. See also: *al-Mawsūʿah al-Fiqhiyyah*, pp. 2:57-59.

<sup>81</sup> See: Elsayed Kandil, *Abortion in Islam*, at: (<http://www.missionislam.com/health/abortion.htm>).

<sup>82</sup> Ismāʿīl ibn Kathīr, *Tafsīr al-Qurʿān al-ʿAzīm*, First Edition, (Beirut, Dār Ibn Ḥazm, 2000), 1865.

<sup>83</sup> Yūsuf Al-Qarḍāwī, *al-Ḥalāl wal-Ḥarām Fil-Islām*, 22<sup>nd</sup> Edition, (Cairo, Maktabat Wahbah, 1997), 178.

<sup>84</sup> Ibid, 176. See also: *Abortion in Islamic and Arab Law* at: (<http://www.sami-aldeeb.com/articles/view.php?id=302&action=english-abortion-in-islamic-and-arab-law>).

for them as well as for you”.<sup>85</sup> Children, accordingly, is a general word that includes fetuses.<sup>86</sup> Second, “*lā yajūzu li-aḥadin an yataṣarrafa fī milki al-ghayri bilā idhn*” (No person may deal with the property of another without such person’s permission). Accordingly, a foetus is the creation of Allah; so no one, even the parents, has the right to make a decision about its life, unless there is a good reason to do so.<sup>87</sup> As keeping the elegance of the mother’s body is not a good reason in this regard, abortion is considered as *taṣarruf fī milk al-ghayr bi-dūn idhniḥ* (dealing with the property of others without their permission). Third, “*al-aṣlu fil-anfusi wal-aṭrāfi al-ḥurmah*” (the norm with regard to souls and limbs is that of impermissibility). This *qāʿidah* is regarded as an exemption of a general *qāʿidah* which says: “*al-aṣlu fil-ashyāʾi al-ibāḥah*” (the norm with regard to all things is that of permissibility). Accordingly, souls and limbs are essentially *maʿṣūmah* (protected) by the law unless a person is convicted of a crime, which follows a prescribed penalty. Since, a foetus is considered, according to this group of scholars, as a human being from conception, it shall not be deprived of its life intentionally.<sup>88</sup>

Abortion is totally impermissible and tantamount to murder, if it was after the entry of the soul into the foetus, which is after 120 days of

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<sup>85</sup> The *Qurʾān*, *Sūrat al-Isrāʾ*: 31.

<sup>86</sup> Al-Qardāwī, *al-Ḥalāl wal-Ḥarām*, 201. Muhammad Raḥīm, *Aḥkām al-Ijḥād*, 270, citing: Ibn Taymiyyah, *al-Fatawā*, 24: 160; al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, 3:477.

<sup>87</sup> Ahmad al-Ḍuwaiḥī, *al-Qawāʿid al-Fiqhiyyah al-Ḥākimah li-Ijḥād al-Ajinnah al-Mushawwahah* (unpublished paper submitted to *Nadwat Taṭbīq al-Qawāʿid al-Fiqhiyyah ʿAlā al-Masāʾil al-Ṭibbiyyah* (Workshop for the application of *qawāʿid fiqhiyyah* on medical issues) sponsored by the Department of Religious Awareness in the Municipality of Riyadh, Saudi Arabia in 1429 A.H. (2008), 9. See also: Kiarash Aramesh, *Abortion: An Islamic Ethical View*, in: (Iranian Journal of Allergy, Asthma and Immunology, Vol. 6, No. 5, pp. 29-33), 31.

<sup>88</sup> Al-Ḍuwaiḥī, *al-Qawāʿid al-Fiqhiyyah al-Ḥākimah li-Ijḥād*, 9.

conception. This legal ruling is a consensus of all the Muslim scholars in the past and present time. It was based on the above mentioned *ḥadīth* and other *nuṣūṣ*, which made it clear that *rūḥ* is blown into the foetus when it is 120 days old in its mother's womb; the point at which a foetus becomes a complete living human being.<sup>89</sup> In this regard, jurists said that the payment of full *diyah* (a hundred camels or their equivalent) becomes incumbent upon any person, who is responsible for the abortion, be it the mother herself or the father, if the baby is aborted alive and then died, while a *ghurrah* (five camels or their equivalent) if it is aborted dead.<sup>90</sup>

However, there are cases when abortion is allowed before or after 120 days. This is the case when medical checks done by specialist, trusted and committed doctors show that the continuation of the pregnancy would necessarily result in the death of the mother, or they show that the foetus is already dead. Such cases are seen to be unanimously agreed upon, although some scholars in the past who considered that abortion is still forbidden even when doctors say it might threaten the life of the mother; according to them, such a determination is *mawhūmah* (doubtful), and that killing a human being is not allowed based on doubt.<sup>91</sup> They seem to apply the *qā'idah fiqhiyyah* which says: "*al-yaqīnu lā yazūlu bil-shakk*" (certainty is not overruled by doubt). This view, however, no longer seems to have any supporters with the introduction of modern medical technologies in all areas, including the area of medical diagnosis.

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<sup>89</sup> *Al-Mawsū'ah al-Fiqhiyyah*, 2:57.

<sup>90</sup> Ibid., pp. 21:62-63. Al-Qardāwī, *al-Ḥalāl wal-Ḥarām*, 178. See also: *Abortion in Islam*, at: (<http://www.alsiraj.net/English/misc/women/html/page24.html>).

<sup>91</sup> See: *al-mawsū'ah al-fiqhiyyah*, 2:57.

Jurists have used some *qawā'id fiqhiyyah* to support that abortion is permissible in the case it threatens the life of the mother. First, the intention of abortion in such cases is to save the mother's life, and since "*al-umūru bi-maqāṣidihā*", such intention is one of the bases of the permissibility of abortion in these cases. Second, abortion can be seen as a means to *raf' al-ḍarar* (eliminating harm), since it prevents the mother of bad consequences and saves her life. However, eliminating harm includes preventing its occurrence, since protection is better than cure; and, in case it occurs, eliminating it by whatever means.<sup>92</sup> Abortion can work in both dimensions according to the situation of the mother. In case that the continuation of the pregnancy, based on reliable medical checks, would cause the mother to contract a permanent and dangerous illness in future, which significantly threatens her life, and where abortion is determined to be the only solution, the *qā'idah fiqhiyyah* says in this regard: "*al-ḍararu yudfa'u qadra al-imkān*" (harm must be prevented – to accrue - as far as possible). In case that harm (dangerous illness) has already occurred because of pregnancy and that abortion would eliminate this kind of harm, it is then allowed based on the *qā'idah* which says: "*al-ḍarar yuzāl*" (harm is removed). Third, abortion is seen as committing the lesser of two evils, when it is diagnosed that pregnancy would lead to either the mother or the fetus to survive, but not both of them. The mother can have other children, whereas the child cannot have another mother. The *qā'idah* says in this context: "*yukhtāru ahwanu al-sharrayn*".<sup>93</sup>

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<sup>92</sup> Al-Ḥarīrī, Ibrāhīm, *al-Qawā'id al-Fiqhiyyah al-Kulliyah*, First Edition, (Amman: Dār 'Ammār, 1998), pp. 89-90.

<sup>93</sup> Al-Duwaiḥī, *al-Qawā'id al-Fiqhiyyah al-Hākimah li-Ijhād al-Ajinnah*, pp. 9-13.

There is no direct comment in the Shari<sup>c</sup>ah on AIDS, nor there are specific guidelines on this disease. This is understood since AIDS has been recently discovered. Some of AIDS related issues have ethical and sociopolitical implications and are beyond the strictly medical context. Thus, public education and cultural attitudes are very important in addressing and overcoming the disease. Islamic law, in this regard, have provided some solutions within the Muslim world and Muslim communities in non-Muslim countries. Muslim community leaders, religious scholars and teachers are vital educators in combating the spread of HIV/AIDS. In this context, *fatwās* were used in the AIDS struggle. For example, two progressive *fatwās* were issued in 2007 at the International Consultation on Islam and HIV and Aids, organised by the charity, Islamic Relief Worldwide (IRW), in Johannesburg, South Africa. One fatwa approved the use of funds from the *zakāt* (mandatory alms giving) for HIV-positive people, whether Muslims or non-Muslim, regardless of how they contracted the virus, as long as they are poor. The other fatwa approved the use of condoms by married discordant couples, where one is HIV-positive and the other is not, to avoid infection.<sup>94</sup>

The attitude of contemporary Muslim scholars towards AIDS varied from one another. For example, Al-Azhar University condemned AIDS as a disease and thought that it is only common among homosexuals. Malik Badri, demonstrated that AIDS is a sign of divine justice towards homosexuals and others who disobeyed God's limits; and he further noted

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<sup>94</sup> See: *Positive Fatwas: Using Religious Rulings in the AIDS Struggle*. 07Ī12Ī07, at:

(<http://www.cabsa.org.za/book/export/html/2816>).

that the only remedy for everyone is to adhere to Islamic values. Mohammad Hashim Kamali reflected on the general Shari'ah principles to develop a Muslim perspective towards this pandemic. He emphasised, among others, the concern for the protection of basic human values, and the mustering of communal resources to prevent individuals from being stigmatised.<sup>95</sup> On the other hand, some contemporary Muslim scholars have discussed issues relate to AIDS legally and have given legal rulings in various matters. For example, Shaykh Muhammad al-Munajjid, a well-known Saudi scholar, has given *fatwās* on issues such as: aborting or caring for a child whose mother has AIDS; marriage of persons who have been diagnosed with HIV.<sup>96</sup>

In this context, many contemporary researchers held the view that a HIV positive mother is not allowed to abort her child. According to them, the virus is not usually transmitted to the foetus until the later stage of pregnancy, i.e. after the soul has been blown into the foetus and around the time of labour and delivery. Therefore, this situation is under the abovementioned general legal ruling, which indicates that abortion is impermissible when a foetus is 120 days or more. The abnormality of being HIV positive does not render abortion permissible, especially when considering the contemporary rapidly changing therapeutic environment, which has allowed many HIV positive women to have healthy pregnancies

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<sup>95</sup> See: Muhammed Haron, "Islam and AIDS: Between Scorn, Pity and Justice (book review)" at: *Journal of Social Aspects of HIV/AIDS*, VOL. 7, NO. 1, JULY 2010, pp. 40-41, p. 40.

<sup>96</sup> See: (<http://www.islamqa.com/en/search/AIDS/AllWords/t,q,a>).



and healthy babies.<sup>97</sup> In this regard, they cited a *qā'idah fiqhiyyah*, which says: “*al-ḍararu al-ashaddu yuzālu bil-ḍarar iāl-akhaḥ*” (Severe injury is removed by lesser injury). Accordingly, abortion is a severe injury, while having a child whose mother is HIV positive is the lesser injury, since the risk for the child to have the virus might become slight due to, as stated above, the new therapeutic environment and the introduction of modern medical technologies.<sup>98</sup>

Most contemporary scholars agreed on the permissibility of the abortion of a foetus, which medical tests have shown is physically deformed. The deformities of the foetus should be certain and proven by trustworthy physicians, and should be after exhausting all possible means of treating the problem.<sup>99</sup> They base their *ijtihād* on the principles of removal of hardship and harm, which are expressed in a number of *qawā'id fiqhiyyah*, such as “*idhā dāqa al-amru ittasa<sup>c</sup>*” (latitude should be afforded in the case of difficulty), “*yukhtāru ahwanu al-sharrayn*” (the lesser of evils is preferred) and “*al-ḍararu yuzāl*” (harm must be eliminated), since the deformed child would most likely face hardship in his life, and so would his parents in taking care of him, and due to the burden which would be placed upon the society. However, aborting a deformed foetus, according to most scholars, becomes impermissible once the soul is blown into the foetus, no

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<sup>97</sup> See: *Majallat al-Majma' al-Fiqhī al-Islāmī*, Vol. 8, No. 3, 9; Vol. 9, No. 1, 65. See also: *Ruling on Aborting or Caring for a Child Whose Mother Has AIDS* at: (<http://www.islamqa.com/en/ref/4038>).

<sup>98</sup> <sup>c</sup> Ayid al-Shahrānī, *Qā'idat Lā Ḍarar Walā Ḍirār Wataṭbīqātuhā al-Ṭibbiyyah*, 29.

<sup>99</sup> Muhammad Raḥīm, *Aḥkām al-Ijhād*, pp. 174-176. Muhammad Saed Abdul-Rahman, *Jurisprudence and Islamic Rulings: Transactions – Part 8*, (London, MSA Publication Limited, 2007), pp. 126-127.

matter what the deformity, unless this condition will put the mother's life at risk.<sup>100</sup>

The legal ruling of abortion of a foetus, which is a result of illegal sex, differs according to nature of the action, whether it was adultery or rape. This classification, however, did not exist in the traditional books of *fiqh*, as scholars then seemed not to have gone into details, on whether the pregnancy resulted from adultery or rape. They seem to consider it to come under the same ruling as abortion of a pregnancy resulting from a proper marriage.<sup>101</sup> Some seemed to allow abortion, during the first 120 days of pregnancy, without considering the nature of the action.<sup>102</sup>

In contrast, contemporary scholars have differentiated between the action of illegal sex, whether it resulted from adultery or rape as follows. In case of adultery, abortion is totally impermissible at any time of pregnancy according to many of the contemporary scholars. According to them, a woman is not allowed to make the foetus to pay for her fault; as the Qur<sup>ʿ</sup>ān insists that: “no one laden with burdens can bear another's burden”.<sup>103</sup> Furthermore, abortion is essentially a *rukḥṣah*, which is to be invoked when there is an excuse. Adultery is a sin, and sins prevent, in most cases, the enjoyment of the *rukḥṣah*. The *qāʿidah fiqhiyyah* says in this regard: “*al-rukḥaṣu lā tunāṭu bil-maʿāṣī*” (concessions cannot be connected to sins). Moreover, abortion in many cases of adultery is intended to cover up this kind of illegal act, which can be a means to *intishār al-fāḥishah* (the spread

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<sup>100</sup> Muhammad Raḥīm, *Aḥkām al-Ijḥād*, pp. 176-177.

<sup>101</sup> See: *Abortion of a Foetus Resulting from a Zina Relationship* at: (<http://www.islamqa.com/en/ref/13331>). See also: Khalīl, Ibrāhīm, *al-Iḡtiṣāb Aḥkām wa-Āthār*, at: (<http://www.airssforum.com/showthread.php/45633-وأثار-أحكام-الاغتصاب>).

<sup>102</sup> *Al-Mawsūʿah al-Fiqhiyyah*, 2:58.

<sup>103</sup> *Sūrat al-Isrāʾ* (17): 15.

of immorality) if it is to be authorized always. As such, allowing a woman who committed adultery to get rid of her pregnancy by abortion is like encouraging her to commit this sin again, while the restriction would most likely prevent her from it. The *qā'idah* says in this context: “*al-aṣlu al-mu'āmalatu bi-naqīḍi al-qaṣḍi al-fāsid*” (the rule is that in the case where the intention is proven to be fraudulent the result is that the converse is to apply). In this regard, it is amongst the duties of the *ḥākim* (ruler) to prevent the spread of immorality by whatever means to achieve the *maṣlaḥah* of the whole community, and to take into consideration the rights of the society as a whole. The *qā'idah* says: “*al-taṣarrufu 'alā al-ra'yyati manūṭun bil-maṣlaḥah*” (management of a citizen's affairs is dependent upon public welfare). As such, forbidding abortion in cases of adultery can be a means to achieve this purpose.<sup>104</sup> This *qā'idah*, however, can work in another aspect. Omar Ghānim, a contemporary researcher said in this regard:

“In addition, the foetus in the case of *zinā* has no guardian, because according to *Sharī'ah* the title of father can only be given to the one who has a child from a woman in a proper marriage. ... The guardian of the foetus in such cases is the ruler – the one who is in charge of the Muslims' affairs – for he is the guardian of those who have no guardian. The way in which the ruler disposes of people's affairs is based on the interests of the people, and there is no interest to be served in destroying the soul of the foetus in order to preserve the mother's interests, because that would

<sup>104</sup> Muhammad Sa'īd Ramaḍān Al-Būṭī, , *Mas'alat Taḥdīd al-Naṣl: Wiqāyah wa-'Ilāj*, Fourth Edition, (Damascus, Maktabat al-Fārābī), pp. 140-142. See also: Ibrāhīm Khalīl, *al-Iḡtiṣāb Aḥkām wa-Āthār*, at: (<http://www.airssforum.com/showthread.php/45633-أحكام-الاغتصاب-وأثار>).

involve encouraging her and others to persist in this evil action”.<sup>105</sup>

In rape cases, on the other hand, almost all contemporary scholars agreed that it is allowed for a raped woman to abort the foetus, in order to relieve distress and hardship. Accordingly, abortion is allowed for her, if she suffered psychological or nervous diseases resulting from this criminal act, or if she feared the affect of this act on her reputation or she thought that shame may be brought upon her family from a matter in which she is not guilty of any sin, or she feared that she may be subjected to harm such as being killed. Likewise, it is allowed for her to abort the foetus, if she thought the baby would suffer harm, such as being outcast. They built this view on some basic principles of *Sharīʿah*, such as *rafʿ al-ḥaraj* (relief of hardship) and *izālat al-darar* (eliminating harm). Among the *qawāʿid fiqhiyyah*, which were used in this context are: “*al-dararu yuzālu*” (harm must be eliminated) and “*al-mashaqqatu tajlibu al-taysīr*” (hardship begets facility). However, scholars say that abortion in all of the mentioned cases and the like should be done during the first 120 days of pregnancy, otherwise it becomes forbidden if it occurs after the soul is breathed into the foetus, where it becomes a complete human being.<sup>106</sup>

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<sup>105</sup> ʿUmar Ghānim, *Aḥkām al-Janīn fil-Fiqh al-Islāmī*, First Edition, (Beirut, Dār Ibn Hazm, 2001), 233. The translation was taken from: (<http://www.islamqa.com/en/ref/13331>).

<sup>106</sup> Ibid., 245. See also: *Abortion of Pregnancy Resulting From Rape* at: (<http://www.islamqa.com/en/ref/13317/%D8%A5%D8%AC%D9%87%D8%A7%D8%B6%20%D8%AC%D9%86%D9%8A%D9%86%20%D8%A7%D9%84%D8%A7%D8%BA%D8%AA%D8%B5%D8%A7%D8%A8>).

## 5.6. Organ Donation.

Organ donation is the donation of an organ or biological tissue from a living or dead person to help someone else, who lost their original organs through accident, disease or other cause, so that the transplanted organs perform the functions that the impaired original organs used to perform.<sup>107</sup> Organs can only be removed for transplantation when all attempts to save life failed.<sup>108</sup> Furthermore, the practice can be for the organs, which are essential for the continuation of life, or those which perform bodily functions.<sup>109</sup>

The issue is new and has not been dealt with by the scholars of the different schools of jurisprudence in the past to determine the legal ruling, although there have been some researches and *fatwās* regarding the use of animal bones to repair human broken bones. In contrast, this issue has occupied a significant part of the discussions of contemporary scholars, both individually and in the workshops and conferences specifically held to deal with such problems and the like. They seem to have agreed upon the permissibility of an organ to be transplanted in one's own body, on condition that this operation outweighed any harm that may result from it, and that it "is done to replace something that has been lost, or to restore its appearance or regular function, or to correct some fault or disfigurement,

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<sup>107</sup> Mohammad Naeem Yaseen, *The Rulings for the Donation of Human Organs in the Light of Shari'a Rules and Medical Facts*, in: Arab Law Quarterly, Vol. 5, No. 1 (Feb., 1990), 49.

<sup>108</sup> See: *Islam and Organ Donation, a Guide to Organ Donation and Muslim Beliefs* (a leaflet issued by NHS Blood and Transplant, 2009) at: ([http://www.uktransplant.org.uk/ukt/newsroom/fact\\_sheets/religious\\_leaflets/islam\\_and\\_organ\\_donation/Islam%20and%20Organ%20Donation.pdf](http://www.uktransplant.org.uk/ukt/newsroom/fact_sheets/religious_leaflets/islam_and_organ_donation/Islam%20and%20Organ%20Donation.pdf)).

<sup>109</sup> Yaseen, *The Rulings for the Donation of Human Organs*, 49.

which is causing physical or psychological distress”.<sup>110</sup> For example, it is permissible to move an artery from one part of the body for the treatment of the cardiovascular. Likewise, it is allowed to replace a damaged or burnt skin or non-healing wound with skin from other parts of the body.<sup>111</sup>

As for the transplanting of an organ from one person to another, there was initially resistance to accept it by a number of well-known contemporary scholars, such as Muhammad al-Sha<sup>c</sup>rāwī (d. 1419 / 1998) and Abdullah al-Ghumārī (d. 1418 / 1997), whether the organ belongs to a dead or a living person. They presented argumentations and what they thought evidence from the Qur<sup>ʿ</sup>ān and the Sunnah and the sayings of the traditional scholars to support their view.<sup>112</sup> Their argumentations conclude that the physical and ethical harms and ill effects of such operations overcome the potential benefits. The matter, however, seems eventually to gain general acceptance among the contemporary scholars, although the majority of Muslim scholars in India and Pakistan are still of the view that organ transplant is not permissible.<sup>113</sup> Furthermore, most of the *fatwā* councils around the Muslim world, such as the head of al-Azhar University in Cairo, the Saudi Grand Scholars Council, the Council of the Islamic Fiqh Academy in Jeddah and other institutions, have approved organ donations

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<sup>110</sup> See: *Majallat al-Majma<sup>c</sup> al-Fiqhī al-Islāmī* (the journal of the Islamic *Fiqh* Council), Vol. 4, No. 1, Feb. 1988, pp. 98-91. The translation is borrowed from: Mufti Muhammad Ibn Adam (Dārul-Iftā<sup>ʿ</sup> (Leicester, UK), *Is organ donation permissible?* at: (<http://www.themodernreligion.com/misc/hh/organ-transplant.html>).

<sup>111</sup> Al-Qarahdāghī and al-Muḥammadi, *Fiqh al-Qaḍāyā al-Ṭibbiyyah*, 489.

<sup>112</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, pp. 357-370. See also: Abdullah al-Ghumārī, *Ta<sup>c</sup>rīf Ahl al-Islām Bi-Anna Naql al-<sup>c</sup>Uḍw Ḥarām*, ed. Ṣafwat Jawdat Ahmad, (Cairo, Maktabat al-Qāhirah, 1998).

<sup>113</sup> See: Mufti Muhammad Ibn Adam (Dārul- Iftā<sup>ʿ</sup> Leicester, UK), *Is organ donation permissible?* at: (<http://www.themodernreligion.com/misc/hh/organ-transplant.html>).

from living or dead persons.<sup>114</sup> However, they have excluded some situations where it is not permissible to donate an organ, such as the donation of an organ from a living person on which their life depends, like the heart or liver.<sup>115</sup>

To support their views, the two parties used different types of evidence and proofs, amongst which are *al-qawā'id al-fiqhiyyah*. Those who opposed organ transplantation, said it is not allowed for anyone to inflict harm upon himself or others, and that organ transplantation is a kind of inflicting harm. The *qā'idah* (which is originally a Prophetic tradition) says: “*lā ḍarara wa lā ḍirār*” (it is unlawful to inflict harm upon one’s self nor upon others).<sup>116</sup> Moreover, they thought of the practice as a removal of harm from one person (the patient) to place it on the other person (the donator), since he will lose one of his organs, which makes the practice impermissible. The *qā'idah fiqhiyyah* says in this regard: “*al-ḍararu lā yuzālu bil-ḍarar*” (Harm is not eliminated by another harm) or: “*al-ḍararu lā yuzālu bi-mithlih*” (harm should not be removed by a similar harm). On the other hand, all parties, they argue, agreed that it is not permissible to subject human organs to sale under any circumstances. Free donation of organs should also be impermissible, because according to a *qā'idah fiqhiyyah*: whatever is permissible to be sold is also permissible to be

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<sup>114</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, pp. 355-356. See also: Abdel Moneim Hassaballah, *Definition of death, organ donation and interruption of treatment in Islam*, in: *Nephrol Dial Transplant* (1996), pp. 11: 964-965. See also: *Organ Transplantation*, at: (<http://www.questionsonislam.com/article/organ-transplantation>).

<sup>115</sup> Al-Qarahdāghī and al-Muḥammadī, *Fiqh al-Qaḍāyā al-Ṭibbiyyah*, 490. See also: *Ruling on Organ Transplants*, at: (<http://www.islam-qa.com/en/ref/2117/>).

<sup>116</sup> Muhammad Ādam Al-Kawtharī, *Is Organ Donation Permissible?* at: ([http://qa.sunnipath.com/issue\\_view.asp?id=2043](http://qa.sunnipath.com/issue_view.asp?id=2043)).

donated and vice versa, “*mā jāza bay<sup>c</sup>uhu jāzat hibatuhu wamā lā falā*”.<sup>117</sup> Furthermore, the human’s body is not in one’s ownership; thus he is not allowed to fiddle with it as he desires. Therefore, one is not allowed to sell, give or donate any organs of his body, nor has he the right to give permission to a third party to utilise it. The *qā’idah* says in this regard: “*man lā yamliku al-taṣarrufa lā yamliku al-idhna fih*” (he who does not have the right to utilise a thing does not have the right to give permissions to others to utilise it).<sup>118</sup>

The majority of scholars, on the other hand, have also used a number of *qawā’id fiqhiyyah* to prove the permissibility of organ transplantation. To start with, the universal *qā’idah* of *niyyah* (i.e. *al-umūru bi-maqāṣidihā*) is an essential component in their argumentations.<sup>119</sup> According to them, organ donations are intended basically to save another person’s life, and this is in accordance to the principles of the Shari<sup>c</sup>ah, which permit the use of unlawful things in cases of extreme need and necessity. In contrast, if the *niyyah* is just to tamper with the human body, which is sacred in the eyes of the Shari<sup>c</sup>ah or to indulge in a criminal action, then such operations are completely forbidden.<sup>120</sup> On the other hand, the receiver of an organ is usually in real, and sometimes extreme, *ḥājah* (need) or *ḍarūrah* (necessity) for the transplantation, since his life is threatened. Either *ḍarūrah* or *ḥājah* in such situations can lead to ease in the provisions, and subsequently, can

<sup>117</sup> Muhammad Burhān al-Dīn Al-Sanbahli, *Qaḍāyā Fiqhiyyah Mu‘aṣirah*, First Edition, (Damascus, Dār al-Qalam, 1408 A.H.), 61. Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, 365.

<sup>118</sup> Ḥasan Al-Shādhli, *Hukm Naql al-A‘ḍā’ fi-l-Fiqh al-Islāmī*, (Cairo, Kitāb al-Jumhūriyyah, 1989), 102. See also: al-Kawtharī, *Is Organ Donation Permissible?* at: ([http://qa.sunnipath.com/issue\\_view.asp?id=2043](http://qa.sunnipath.com/issue_view.asp?id=2043)).

<sup>119</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, 379.

<sup>120</sup> Ibid.



make prohibited things lawful.<sup>121</sup> For the *darūrah*, the *qā'idah fiqhiyyah* is explicit in demonstrating this matter. It says: “*al-darūrātu tubīḥu al-maḥdūrāt*” (necessity renders prohibited things permissible). For *hājah*, another *qā'idah* states that it, whether for an individual or a group, can be treated in equal terms like *darūrah*: “*al-hājatu, khāṣṣatan kānat aw 'āmmatan, tunazzalu manzilata al-darūrah*”.<sup>122</sup> Moreover, all scholars acknowledge that taking an organ from a living or dead person is a kind of *mafsadah* (evil) (since it causes pain and loss for the living person, and deformity for the body of the dead), yet the *mafsadah* which will result from not to taking the organ and transplanting it into the body of the patient is greater, which is death. According to the *qā'idah*, in the presence of two evils, the one whose injury is greater is avoided by the commission of the lesser: “*idhā ta'āraḍat mafsadatāni, rū'ya a'ḍamuhumā ḍararan bi-irtikābi akhaffihimā*”.<sup>123</sup> In another context, and based on another *qā'idah*, which says “*al-aḥkāmu tataghayyaru bi-taghayyuri al-azmān*” (a *fatwā* or a legal ruling can change with the change of times), organ transplantation should be allowed in our time. If such a practice was beset with danger and risk and the sequence was unsafe due to the fact that surgical methods and tools were simple or even primitive, in our time, it is safe and is done by and under the supervision of experts and specialists. According to the *qā'idah uṣūliyyah*, the *'illah* (legal reason) is connected to the ruling in existence and absence. The *'illah* of the prohibition of operating the surgeries of

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<sup>121</sup> *Hājiyyāt* are those things which put a person in a difficulty if not fulfilled, even though their neglect does not lead to total disruption of normal life. *Ḍaruriyyāt*, on the other hand, are those on which the lives of the people depend, and their neglect leads to total disruption and chaos. See: Kamali, *Shari'ah Law*, 34.

<sup>122</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, 377.

<sup>123</sup> Ibid., 378.

organ transplantation is, to a great extent, no longer existing; therefore, the ruling should subsequently change.<sup>124</sup>

## 5.7. Anaesthetization

The use of anaesthetic for surgical purposes is permissible in Islamic law to avoid undue hardship for the patient. It has been exempted from the prohibition of substances, which cover and affect the intellect, such as drugs, intoxicants, etc.<sup>125</sup> This legal ruling is not, however, the product of *ijtihād* of the contemporary scholars; rather, it has been mentioned in a number of traditional *fiqhī* works, although the sorts and usage of anaesthetics may differ. Ibn Farḥūn (d. 799 / 1397), for example, said in this regard: “apparently it is permissible to drink an anaesthetic in order to amputate an organ, as the harm of the anaesthetic is little, compared to the harm of the organ, if left without amputation.”<sup>126</sup> Al-Mardāwī (d. 885 / 1480) also said: “if the intellect is covered by an anaesthetic, it is either for medication or for unnecessary purposes: if it is for the former, the person concerned is excused and the legal ruling of his situation is then similar to that of the insane; whereas for the latter their legal ruling is similar to the drunk”.<sup>127</sup>

Therefore, illness which requires surgical intervention is seen as *ḍarūrah*, which can render prohibited things (i.e. the use of anaesthetics in this case) lawful, as this is explicit in the *qāʿidah* which says: “*al-ḍarūrātu*

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<sup>124</sup> Ibid., pp. 378-379.

<sup>125</sup> Ibid., 288.

<sup>126</sup> Ibn Farḥān, *Tabṣīrat al-Hukkām*, pp. 2:169-170.

<sup>127</sup> Al-Mardāwī, *al-Inṣāf*, 8:438.

*tubiḥu al-maḥḍūrāʿ*. This situation is also expressed in the third of the universal *qawāʿid*, which says: “*al-mashaqqatu tajlibu al-taysir*” (hardship begets facility). As such, illness, which demands surgical intervention is a sort of hardship, and the use of anaesthetics is the reflection of facility and ease.<sup>128</sup>

However, the need to use anaesthetic differs according to the situation of the patient, and subsequently the legal rulings may differ. In many situations, the use of anaesthetic may become legally obligatory (besides being medically necessary); in cases that strongly demand surgical intervention, which, in turn, cannot be conducted without general anaesthetization, as in the case of open heart operations. Conducting some kinds of operations, on the other hand, can be without anaesthetization, yet the patient would suffer severe pain, the use of anaesthetics in such cases is permissible, although the situation is categorised as *ḥājah* and not *darūrah*. *Ḥājah* can sometimes be treated as *darūrah*, as it is stated in the *qāʿidah*, which says: “*al-ḥājatu tunazzalu manzilata al-darūrah*”. In other cases, such as body surface surgery (for example, an inguinal hernia repair<sup>129</sup>) or teeth extraction, where surgery can be conducted without the need for general anaesthetization, local anaesthetization should be

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<sup>128</sup> ʿAbd al-Salām Al-Ḥaṣīn, *Taṭbīq al-Qawāʿid al-Fiqhiyyah ʿAlā Masāʾil al-Takhdīr al-Muʿāṣirah*, (unpublished paper submitted to *Nadwat Taṭbīq al-Qawāʿid al-Fiqhiyyah ʿAlā al-Masāʾil al-Ṭibbiyyah* (Workshop for the application of *qawāʿid fiqhiyyah* on medical issues) sponsored by the Department of Religious Awareness in the Municipality of Riyadh, Saudi Arabia in 1429 A.H. (2008), pp. 37-39.

<sup>129</sup> Although there are certainly other options (including general anaesthesia and regional anaesthesia, such as spinal or epidural), local anaesthetization offers some unique advantages to the patient, such as minimal physiological disturbance, postoperative pain relief, etc. See: *Local Anesthesia for Inguinal Hernia Repair* at: (<http://anesthesiologyinfo.com/articles/04102002.php>).

employed. The *qā'idah* says in this regard: “*al-darūratu tuqaddaru bi-qadarihā*” (necessity is determined by the extent thereof).<sup>130</sup>

Besides, the permissibility of using anaesthetic depends, in another aspect, on the type of surgery. As such, when there is real illness that demands surgical intervention, the usage of anaesthetic is permissible; such situations are categorised as either *darūrah* or *hājah*, both of which may render the unlawful lawful. Unnecessary or unlawful types of surgeries, on the other hand, make the employment of anaesthetic impermissible. Sex change operations, unnecessary cosmetic surgeries and operations to abort fetuses when there is no good reason are examples of this kind. The *qā'idah* says in this concern: “*al-wasā'ilu lahā hukmu al-maqāsid*” (means are judged with the same criteria as the targets). Furthermore, such kinds of operations are considered as sins, and based on another *qā'idah* which says: “*al-rukhaṣu lā tunāṭu bil-ma'āṣi*” (concessions cannot be connected to sins), employment of anaesthetic is then forbidden, since, generally speaking, its use is a sort of *rukḥṣah*.<sup>131</sup>

The general legal ruling is that if the situation of a patient worsened after the surgery or treatment, the doctor who treated or conducted a surgery on him, is totally free from any legal liability, subjected that he (the doctor) adheres to the medical methods and rules in carrying out operations and prescribing medication.<sup>132</sup> This is true with regard to the anaesthetist, as long as he ensured the safety of a patient undergoing an

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<sup>130</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, pp. 283-285. Al-Ḥaṣīn, *Taṭbīq al-Qawā'id al-Fiqhiyyah 'Alā Masā'il al-Takhdīr*, 37. pp. 41-42.

<sup>131</sup> Al-Ḥaṣīn, *Taṭbīq al-Qawā'id al-Fiqhiyyah 'Alā Masā'il al-Takhdīr*, 45.

<sup>132</sup> Ṭalāfḥah, Muhammad, *Qā'idat al-Jawāz al-Shar'i Yunāfi al-Damān Wataṭbīqātuhā fil-Fiqh al-Islāmī wal-Qānūn*, in: Al-Majallah al-Urduniyyah fil-Dirāsāt al-Islāmiyyah, Vol. 2, No. 4 (al-Mafraq - Jordan -, 2006), 207.

operation, gave the recommended dose of anaesthetic taking into account the condition of the patient, and employed the anaesthetization in the proper manner. The *qā'idah* says expressing this ruling: “*al-jawāzu al-shar'yyu yunāfi al-damān*” (legal permission is incompatible with liability). Therefore, since the profession of being an anaesthetist is legally permissible, it should not be made the subject of a claim to compensation, as long as it has been performed in the proper manner.<sup>133</sup> However, the anaesthetist is solely fully responsible in cases of neglect, malpractice and the like. He is also responsible, if he, for example, based on the desire of the patient, employs general anaesthetization when the situation only requires local anaesthetization, which resulted in bad effects on the patient. The preference of the patient does not relieve an anaesthetist from responsibility, as he is the author of the act. The *qā'idah* says: “*yuḍāfu al-fi'lu ilā al-fā'ili, lā ilā al-āmir, mālam yakun mujbaran*” (the responsibility for an act falls upon the author thereof; it does not fall upon the person ordering such act, provided that such person does not compel the commission thereof).<sup>134</sup>

In surgeries, which require general anaesthetization, the patient, while anaesthetized, is free from all the commitments or contracts he obliged upon himself, such as their acknowledgement of a debt to another party or their acknowledgement of committing a crime. Their pronouncement of a divorce is also with no consequence, be it the first, the second or irrevocable sort of divorce. The patient is totally unconscious, where the ability of intent or distinguishing between things is temporarily

<sup>133</sup> Al-Ḥaṣīn, *Taṭbīq al-Qawā'id al-Fiqhiyyah 'Alā Masā'il al-Takhdīr*, pp. 45-46.

<sup>134</sup> Ibid., pp. 46-47.

lost, and what they utter is out of this state. Actions and utterances, according to the *qā'idah* of intention (i.e. *al-umūru bi-maqāṣidihā*), are determined according to the intention behind them. In the cases where the ability to have intent is lost, as is the case here, none of the behaviours of the persons concerned is of legal consequence.<sup>135</sup> Furthermore, when discussing the divorce of a drunk person, jurists, who hold the view that this divorce is invalid, argued that intention is an essential component in contracts and commitments, so as to be made mandatory, and since the drunk is out of mind, their divorce is void. In support of their position, they mentioned a *qā'idah* which reads: "*kullu lafẓin bi-ghayri qaṣḍi al-mutakallimi lā yu'tabar*" (any unintentional utterance has no consequences).<sup>136</sup> While anaesthetized, the state of the patient is apparently more expressive of this principle. As stated above, his ability to intend or distinguish between things is temporarily lost.<sup>137</sup>

In another context, there are two different views among the contemporary scholars regarding the validity of the fasting of a patient in the case when the operation is carried out early, i.e. before the entry time of morning (Fajr) prayer, after the patient had already made a decision to fast, and where the effect of the anaesthesia lasted until sunset (the time when fasting ends). According to some researchers, since the patient had made the decision and intention to fast (regardless of the potential bad effects of fasting on his health), their intention is still considered, and therefore the fasting is valid and he is, subsequently, discharged from the duty. This is,

<sup>135</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, pp. 594-597.

<sup>136</sup> See: Taqiy al-Dīn Ibn Taymiyyah, *Majmū' al-Fatāwā*, Third Edition, (Manṣūrah –Egypt-, Dār al-Wafā', 1995), 33:64.

<sup>137</sup> Al-Ḥaṣīn, *Taṭbīq al-Qawā'id al-Fiqhiyyah 'Alā Masā'il al-Takhdīr*, 50.

according to them, in accordance with the universal *qā'idah* of intention, i.e. *al-umūr bi-maqāsidihā*.<sup>138</sup> Other scholars, on the other hand, thought of the continuation of the effect of anaesthesia until sunset to invalidate the fasting. The situation of such a patient, they argued, is, by analogy, similar to the situation of the person who fell unconscious from dawn to sunset or for a longer time. In this context, according to the majority of the scholars in the past (the Mālikīs, the Shāfi'īs and the Ḥanbalīs), the fasting of the person who is in an unconscious state is not valid if their situation persists for the whole period of the fast, even if they had intention to fast, because valid fasting requires intention, and actual and by choice *imsāk* (refraining from food and drink).<sup>139</sup> Similarly, the anaesthetized person, although he has had the intention to fast, their *imsāk* is not by choice, which invalidates their fasting.<sup>140</sup>

## 5.8. Plastic Surgery.

Plastic surgery is defined as “any surgical procedure performed for the sake of beautification (modifying a person’s appearance) of one or more parts of the external human body or restoring its function, if significant impairment has occurred”.<sup>141</sup> However, according to some, there are two main types of plastic surgery, cosmetic and reconstructive. The former seeks to improve the patient’s features on a purely aesthetic level, where

<sup>138</sup> Ibid., 51. This was, however, the view of the majority of researchers who attended the workshop held in Rabat in 14-17 June 1997 by the Islamic Organization for Medical Sciences (IOMS). See: (<http://www.islamset.com/arabic/abioethics/clone.html>).

<sup>139</sup> See: *al-Mawsū'ah al-fiqhiyyah*, pp. 28:27-28.

<sup>140</sup> See: Does Having an Anaesthetic via Injection During Ramadaan Break the Fast? at: (<http://www.islamqa.com/en/ref/65632>). See also: *Athar al-Takhdīr 'Alā al-Siyām* at: (<http://www.islamset.com/arabic/abioethics/clone.html>).

<sup>141</sup> See: *What is the Resolution of the Islamic Fiqh Academy on Plastic Surgery?* at: (<http://www.islamopediaonline.org/fatwa/what-resolution-islamic-fiqh-academy-plastic-surgery>).

there is no any deformity or trauma. The purpose of reconstructive plastic surgery, on the other hand, is to correct physical features, which are grossly deformed or abnormal by accepted standards, either as a result of a birth defect, congenital disorder, illness, or trauma. It also seeks to correct or improve some deficiency or abnormality in the function of the body part in question.<sup>142</sup>

Contemporary Muslim scholars seem to be in agreement that a plastic surgery is allowed when there is a real necessity or need, such as removing congenital defects (for example, removing an extra digit), or to treat defects caused by sickness, traffic accidents, burns, etc.<sup>143</sup> This view applies to the second of the abovementioned categories of plastic surgeries, i.e. reconstructive plastic surgery. To prove this, scholars cited a *ḥadīth* when the Prophet (PBUH) allowed a companion called ʿArfajah ibn Saʿd, whose nose was cut in a battle, to wear a nose made of gold.<sup>144</sup> Besides, conducting such surgeries is not intended to what is termed as *taghyīr khalq Allah* (changing Allah's creation), which is the essential factor why many scholars forbid many types of modern plastic surgeries, as will be stated later.<sup>145</sup> However, the main reason for allowing such surgeries is to remove harm, and relieve the person concerned from physical and

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<sup>142</sup> See: *What is Plastic Surgery?* at:

([http://plasticsurgery.about.com/od/historyofplasticsurgery/a/what\\_is\\_PS.htm](http://plasticsurgery.about.com/od/historyofplasticsurgery/a/what_is_PS.htm)).

<sup>143</sup> Muhammad Maṣṣūr, *al-Aḥkām al-Ṭibbiyyah al-Mutaʿalliqah bil-Nisāʾ*, First Edition, (Amman, Dār al-Nafāʾis, 1999), pp. 184-185. Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, pp. 182-188. Al-Qarahdāghī and al-Muḥammadi, *Fiqh al-Qaḍāyā al-Ṭibbiyyah*, pp. 530-532. See also the *Fatwās of the Saudi grand Muftī on cosmetic surgery* at: ([http://tatweerserv.net/~ssfcmor/ssfcm\\_ar/index.php?fuseaction=content.fullcontent&mainsection=0000000037&Pub=Yes&Num\\_of\\_articals=15&artical=0000006618&from=15&PRNT=true](http://tatweerserv.net/~ssfcmor/ssfcm_ar/index.php?fuseaction=content.fullcontent&mainsection=0000000037&Pub=Yes&Num_of_articals=15&artical=0000006618&from=15&PRNT=true)).

<sup>144</sup> Al-Qarahdāghī and al-Muḥammadi, *Fiqh al-Qaḍāyā al-Ṭibbiyyah*, 540.

<sup>145</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, 187.



psychological suffering. This is in accordance with the universal *qā'idah* of eliminating harm, i.e. "*al-ḍararu yuzāl*".<sup>146</sup> However, this is conditional on that surgery will not result in harm exceeding the anticipated benefit. This is to be decided by trustworthy specialists, as has been clearly stated in the resolution of the Islamic *Fiqh* Council on this issue.<sup>147</sup> This issue can clearly come under the remit of the *qā'idah*, which says: "*al-ḍararu lā yuzālu bil-ḍarar*" (an injury should not be removed by another injury).

Scholars, on the other hand, disagreed in the cases where there is no clear necessity to perform such a surgery (the first type of the above mentioned categories of plastic surgery, i.e. cosmetic surgery). Some considered that any type of cosmetic surgery as *taghyīr khalq Allah* and *muthalah* (mutilation of one's body). This includes surgeries, such as breast augmentation, tummy tucks, rhinoplasty, face lifts, etc.<sup>148</sup> According to this group of scholars, the intention behind these types of surgeries is just seeking beautification, which does not stand alone as a suitable reason for permitting them. Rather, intending mere beautification, according to them, was the *'illah* (reason) for the cursing by the Prophet (PBUH) of those women, who carry on kinds of make-up. Al-Bukhārī and Muslim narrated, in this context, that Abdullah ibn Mas'ūd said: "I heard the Messenger of Allah (PBUH) cursing those women, who pluck their eyebrows and file their

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<sup>146</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, 185. Al-Qarahdāghī and al-Muḥammadi, *Fiqh al-Qadāyā al-Ṭibbiyyah*, 532.

<sup>147</sup> The resolution was in the eighteenth session of the Council held in Putrajaya, Malaysia, in July 9 - 14, 2007. See: *The Resolution of the Islamic Fiqh Council on the Issue of Plastic Surgery and its Rules* at: ([http://amjaonline.com/en\\_f\\_details.php?fid=77165](http://amjaonline.com/en_f_details.php?fid=77165)).

<sup>148</sup> l-Shinqīṭī, *Aḥkām al-Jirāḥah*, pp. 191-192.

teeth for the purpose of beautification and change the creation of Allah.<sup>149</sup> In addition, many of these surgeries are intended for *tadlīs*, i.e. to deceive others, especially marriage candidates.<sup>150</sup> Accordingly, ill-intention makes them unlawful, as indicated by the universal *qāʿidah* of intention: “*al-umūr bi-maqāṣidihā*”. And, since this is the case, it will also be unlawful for a Muslim surgeon to carry out surgery in order to merely make someone look better or to improve their appearance.<sup>151</sup>

On the other hand, other scholars view that every type of cosmetic surgery should be examined individually, since each has its own features and motivations, which should be the base for extracting the proper legal ruling.<sup>152</sup> Accordingly, a surgery can be permitted as long as it meets a number of conditions as follows. First, there is no direct *naṣṣ*, which prohibits it in specific (such as the *ḥadīth*, which forbids tattoos and the like). Second, the surgery is not implied in a general prohibition (such as the prohibition of men to imitate women and vice versa, which implies the prohibition of sex change operations). Third, the surgery should be performed upon permission of the patient (who has requested the surgery). Fourth, there is no other way of treatment that would be less harmful and invasive for the body than surgery. Fifth, there will be no harmful consequences after the operation, which may be greater than the current

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<sup>149</sup> Muṣliḥ al-Najjār, *al-Ḍawābiṭ al-Sharʿiyyah lil-ʿAmaliyyāt al-Tajmīliyyah*, (a paper submitted to the second conference for Islamic Jurisprudence held in Imam Muhammad Ibn Saud University in Riyadh in 1431 A.H (2010), Vol. 3, pp. 2499-2501.

<sup>150</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, 195.

<sup>151</sup> See: *Is it Permissible for a Muslim Surgeon to Perform Cosmetic Surgery on a Patient?* at: (<http://www.islamopediaonline.org/fatwa/it-permissible-muslim-surgeon-perform-cosmetic-surgery-patient>).

<sup>152</sup> Al-Najjār, *al-Ḍawābiṭ al-Sharʿiyyah lil-ʿAmaliyyāt al-Tajmīliyyah*, pp. 2502-2503.

situation of the body.<sup>153</sup> Obviously, the fifth condition refers to the *qā'idah* which reads: “*al-darar lā yuzāl bil-darar*” (an injury should not be removed by another injury).

The intention of mere beatification, according to these scholars, should not be considered the *'illah* for prohibiting all kinds of cosmetic surgery, because seeking beautification is encouraged by the *Sharī'ah* in the first place. The Prophetic *ḥadīth* says: “Allah is beautiful and He likes beauty”.<sup>154</sup> Therefore, intending more beautification is lawful, and subsequently can be a means to rewards and blessing, according to the *qā'idah* of intention: “*al-umūr bi-maqāṣidihā*”. In addition, seeking beautification in one's body, according to many traditional jurists, can also be a means to remove psychological harm and stress. For example, some jurists mentioned amongst the reasons of making *tayammum* instead of *wuḍū'* is one's fear that using water may cause very clear deformity in one of their external limbs.<sup>155</sup> Likewise, full *ḍiyah* is to be paid to the injured party if an assault resulted in the full loss of the function of a limb or caused clear deformity in one of the external limbs, which is an element for beauty in one's body, such as the face, the nose, etc.<sup>156</sup> Removal of harm, be it material or psychological, is intended by the *Sharī'ah*, as the universal

<sup>153</sup> Hānī Jubayr, *al-Dawābiṭ al-Shar'īyyah lil-'Amaliyyāt al-Tajmīliyyah*, (a paper submitted to a workshop discussing cosmetic surgeries between *fiqh* and medicine, held in Riyadh in 1427 A.H (2006). See: (<http://www.gunfdh.com/vb/showthread.php?t=2698>). Hānān Jistīnyah, *al-Qawā'id wal-Dawābiṭ al-Ḥākimah li-'Amaliyyat al-Tajmīl*, (a paper submitted to the second conference for Islamic Jurisprudence held in Imam Muhammad ibn Saud University in Riyadh in 1431 A.H (2010) discussing contemporary medical issues. The papers were published in five large volumes), Vol. 3, 2786. See also: *The Resolution of the Islamic Fiqh Council on the Issue of Plastic Surgery and Its Rules* at: ([http://amjaonline.com/en\\_f\\_details.php?fid=77165](http://amjaonline.com/en_f_details.php?fid=77165)).

<sup>154</sup> Hānī Jubayr, *al-Dawābiṭ al-Shar'īyyah lil-'Amaliyyāt al-Tajmīliyyah*, at: (<http://www.gunfdh.com/vb/showthread.php?t=2698>).

<sup>155</sup> Ibn Qudāmah, *al-Mughnī*, 1: 336.

<sup>156</sup> Al-Mirghinānī, *al-Hidāyah*, 4:179.

*qā'idah* indicates, i.e. “*al-darar yuzāl*”. However, carrying out a cosmetic operation for ill-intentions is totally prohibited. For example, the surgeries carried out to deceive other people (such as a woman or a man doing face lifts to look younger with an intention to deceive a marriage candidate), or the surgeries meant to disguise criminals to avoid detection.<sup>157</sup> The surgeon who conducted these operations and the like is also responsible, if he knows about the evil intention behind them, and the reverse is true.

The motivation for many modern plastic surgeries, however, is not always just seeking mere beautification. Rather, they can be for other reasons, which can place them under the category of *hājah* or even under the category of *darūrah*, both of which can render what is unlawful lawful, as indicated by the *qawā'id* in this respect: “*al-darūrātu tubāḥu al-maḥdūrāt*” and “*al-hājatu tunazzalu manzilata al-darūrah*” respectively.<sup>158</sup> To give some examples, breast augmentation is prohibited when the breasts are in the normal size and carrying on a cosmetic surgery on them has no real demand; but it can be permissible in some circumstances where the breasts are significantly flabby or small, in a sense they cause the person concerned great psychological and physical suffering.<sup>159</sup> Likewise, tummy tucks are permissible when they are intended, for example, for medical treatment to protect from serious diseases, or to restore a woman's

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<sup>157</sup> Al-Qarahdāghī and al-Muḥammadī, *Fiqh al-Qadāyā al-Ṭibbiyyah*, 541. Bishara Atiyeh and others, *Aesthetic Surgery and Religion: Islamic Law Perspective*, Aesth Plast Surg (2008) 32, 7.

<sup>158</sup> Al-Qarahdāghī and al-Muḥammadī, *Fiqh al-Qadāyā al-Ṭibbiyyah*, 532.

<sup>159</sup> Ḥanān al-Qaḥṭānī, *ʿAmaliyyat Tajmīl al-Thady*, (a paper submitted to the second conference for Islamic Jurisprudence held in Imam Muhammad Ibn Saud University in Riyadh in 1431 A.H (2010) discussing contemporary medical issues. The papers were published in five large volumes), Vol. 4, 3355.

significantly enlarged abdomen to its natural shape after multiple pregnancy and childbirth.<sup>160</sup>

### 5.9. Repairing a Ruptured Hymen

This is a (pure) contemporary *nāzilah*, whose legal ruling is not mentioned neither in the Qurʾān nor in the *Sunnah* directly or indirectly, and has not been discussed by traditional scholars, perhaps because it was beyond imagination to happen in their time.<sup>161</sup> The issue relates to a matter, which has a strong social and ethical consideration in most Muslim communities; i.e. virginity, which is defined as an intact hymen. Virginity is considered a sign of sexual purity in most Muslim societies, and represents the honour of a woman and her family. The break of the hymen of an unmarried woman is perceived as a proof of having indulged in illicit sex, and subsequently, serious problems, crime or even blood feuds may arise if a newly-married girl is found not to be a virgin.<sup>162</sup> Furthermore, it also has a remarkable impact in the law, for there are a number of situations, in which the legal rulings of a virgin girl are different from those of a non-virgin girl in the chapter of marriage in *fiqh*, such as the requirement of the verbal approval for marriage, and the presence of the *walī* (guardian) in the

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<sup>160</sup> Al-Qarahdāghī and al-Muḥammadi, *Fiqh al-Qaḍāyā al-Ṭibbiyyah*, 541. See also: (<http://www.al3ez.net/vb/printthread.php?t=3622&pp=10&page=35>).

<sup>161</sup> See: Muhammad Yasīn, *Ratq Ghishāʾ al-Bakārah fī Mizān al-Maqāṣid al-Sharʿiyyah* at: (<http://majles.alukah.net/showthread.php?t=15874>).

<sup>162</sup> H.A. Abder-Rahman, “Hymen Care for Unmarried Muslim Females: Role of the Forensic Consultant in Gynaecology Interventions”, in: *Eastern Mediterranean Health Journal*, Vol. 15, No. 4, 2009, 862.

marriage contract (according to some schools who differentiate between virgin and non-virgin girls in this regard).<sup>163</sup>

The issue of repairing a ruptured hymen has been raised in the modern age. It has been discussed by scholars individually and collectively, and a number of researches<sup>h</sup> have been presented in this regard in some workshops, such as the workshop held in Kuwait in 1987 under the name of *Nadwat al-Ru<sup>ṣ</sup>yah al-Islāmiyyah li-Ba<sup>ḥ</sup>d al-Mumārasāt al-Ṭibbiyyah* (the workshop for the Islamic view over some medical practices).<sup>164</sup> However, the issue is subject to considered controversy, as contemporary scholars are not in agreement over the permissibility of the operations to repair the ruptured hymen for virgin girls. As such, there are two scholarly opinions over this issue. The first party held the view that such operations are not permissible by any means, believing that the operation threatens the system, which controls women and prevents extra-marital sex through harsh punishment. Other scholars, on the other hand, discuss thee details, where according to them, the matter should be seen in different considerations, as follows:

1. If the hymen was ruptured by intercourse within the bounds of legal marriage (as in the case of a divorced woman), or by *zinā* (illicit sexual outside the bounds of marriage), which was well known among the community: such an operation is then *ḥarām*.

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<sup>163</sup> See detailed discussions on these issues in: *al-Mawsū<sup>ḥ</sup>ah al-Fiqhiyyah*, pp. 8:176-182; pp. 45:173-174 respectively. See also: *Baḥt Mufaṣṣal Hawl al-Wilāyah fil-Zawāj* at: (<http://palmoon.net/7/topic-1631-65.html>).

<sup>164</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, 428.

2. If the rupture of the hymen was caused by an action that is not considered in the *Shari'ah* to be a sin, and was not caused by intercourse within the bounds of legal marriage, then: if the girl will most likely suffer hardship and unfair accusations because of the customs and traditions of her society, then doing this operation is obligatory. If that is not the case, then it is still better to do the operation.

3. If the rupture was caused by *zinā*, yet is not well known among the people, then the doctor has the choice of either conducting or not conducting the surgery, although it is better to conduct it.<sup>165</sup>

Each of the two groups have presented some argumentations to support their view.<sup>166</sup> *Al-qawā'id al-fiqhiyyah* has a considered share in this debate. For the first group, the intention behind such operations in many cases, they argue, is to cover criminal actions, i.e. illegal sex. This may lead to deceiving future marriage candidates, who, in most cases, consider real virginity as one of the essential criteria for the girls they intend to marry. Therefore, according to the universal *qā'idah* of intention, i.e. "*al-umūru bi-maqāṣidihā*", such an operation is not permissible. Furthermore, according to them, this kind of operation is a means to deceiving others, and since deceiving is prohibited in Islam, whatever leads to it is also prohibited. The *qā'idah* says in this concern: "*al-wasā'ilu lahā ḥukmu al-maqāṣid*" (means

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<sup>165</sup> See: Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, pp. 428-429. See also: *Ruling on Operations to Repair the Hymen* at: (<http://islamqa.com/en/ref/844>).

<sup>166</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, pp. 428-434. See: Muhammad Yasin, *Ratq Ghishā' al-Bakārah fī Mizān al-Maqāṣid al-Shar'iyyah* at: (<http://majles.alukah.net/showthread.php?t=15874>).

are judged with the same criteria as the targets).<sup>167</sup> Moreover, according to another *qā'idah*, removing of something harmful should not be by something else that is also harmful, i.e. “*al-darara lā yuzāl bil-darar*” or “*al-dararu lā yuzālu bi-mithlih*”. Accordingly, it is not permissible for a girl and her family to remove harm from themselves by having the hymen repaired and thus causing harm to the husband.<sup>168</sup> Moreover, such operations will have bad impact on the society as a whole, for they would make it easy for girls and young women to commit *zinā*, because they know that they can have the hymen repaired afterwards. In addition, they could lead to *ikhtilāt al-ansāb* (mixing of lineages), because a girl could become pregnant from a previous intercourse, then, after having her hymen repaired, she gets married, which then leads to the pregnancy being attributed to her husband, thus mixing *ḥalāl* with *ḥarām*. Therefore, to forbid this kind of operation, although will have bad consequences on the girl, it will ward off public harm. The *qā'idah* says in this regard: “*yutaḥammalu al-darar al-khāṣṣu li-man<sup>c</sup>i al-darari al-‘amm*” (a private injury is tolerated in order to ward off a public injury).<sup>169</sup>

The other group, on the other hand, has also used the *qā'idah* of intention (*al-umūru bi-maqāṣidihā*), taking into account the principle of *sitr al-mu'min* (hiding the misdeeds of the believer), which is very valued in Islam. Such operations, according to them, are carried out with the intention to achieve this principle for girls in cases where the breaking of

<sup>167</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, 430.

<sup>168</sup> Al-Shahrānī, *Qā'idat Lā Darar Walā Dirār Wataṭbīqātuhā al-Ṭibbiyyah*, 23. See also: *Ruling on Operations to Repair the Hymen* at: (<http://islamqa.com/en/ref/844>).

<sup>169</sup> Al-Shahrānī, *Qā'idat Lā Darar Walā Dirār Wataṭbīqātuhā al-Ṭibbiyyah*, 32. See also: *Ruling on Operations to Repair the Hymen* at: (<http://islamqa.com/en/ref/844>).



the hymen was caused by an accident or action not deemed in the *Sharī'ah* to be a sin, or even by *zinā*, but the case is not known among the people. On the other hand, conducting such operations, according to them, is a kind of removing harm, which makes the practice permissible in the cases where the breaking of the hymen was caused by an accident and that the girl will most likely suffer hardship and unfair accusations, because of the customs and traditions of her society. The universal *qā'idah* says in this regard: “*al-dararu yuzāl*” (harm must be eliminated).<sup>170</sup>

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<sup>170</sup> Al-Shinqīṭī, *Aḥkām al-Jirāḥah*, 431. See also: *Ruling on Operations to Repair the Hymen* at: (<http://islamqa.com/en/ref/844>).

## CONCLUSION

## CONCLUSION

At the end of this study, the following is a summary of its whole content, including observations and a conclusion.

(1) *ʿIlm al-Qawāʿid al-Fiqhiyyah* is one of the fundamental Islamic sciences. It is concerned with the legal maxims and fundamental juristic principles and their scope of application on the *juzʿiyyāt* (particulars). Being principles that contain general legal rulings, *al-qawāʿid al-fiqhiyyah* have been extracted from the sources of the *Sharīʿah*, whether primary sources, i.e. the *Qurʾān*, the *Sunnah*, *ijmāʿ* and *qiyās* or secondary ones, like *istiṣlāḥ*, *istiṣḥāb* and the other methods of *ijtihād*. Furthermore, the genre is seen as important in the *fiqhī* thought in multiple aspects. As such, *qawāʿid* achieved the task of categorizing cases according to related general principles, enabling jurists to have adequate knowledge of *juzʿiyyāt* of the different chapters of *fiqh* without needing to memorise them all. Further, they help jurists to have considered knowledge of *Maqāṣid al-Sharīʿah* (the intentions and goals of the *Sharīʿah*), which might not be as such when dealing with the particulars separately. Moreover, the analogical nature of *qawāʿid* have significantly saved the effort of the *mujtahid* (a person entitled to perform *ijtihād*) to extract legal rulings for new issues. *Qawāʿid* also encompass within their remit many of the *Sharīʿah* values and principles, such as *ʿurf*, *sad al-dharāʿiʿ* and *istiṣḥāb*, and many of them convey ethical connotations.

(2) Referring to the conditions which were laid down by jurists for practicing *ijtihād*, knowledge of *qawā'id al-fiqh*, *uṣūl al-fiqh* and *maqāṣid al-sharī'ah* are the most significant elements, which a jurist must have adequate knowledge about to be qualified as a *mujtahid*. For *uṣūl al-fiqh*, it provides jurists with guidelines and criteria that they should follow, while making their efforts to find out legal rulings for new problems based on the sources of *Sharī'ah*. Knowledge of *maqāṣid al-sharī'ah* is important in this regard, because it calls the attention of the *mujtahid* to the end result and consequences of his rulings. Indeed, *fatwā* would be deficient if it fails to contemplate its own consequences. The analogical nature of *qawā'id al-fiqh*, on the other hand, help significantly in finding out proper legal judgement for novel issues. However, *ijtihād* in contemporary times requires deeper knowledge of these genres, because modern society often presents a more challenging prospect for *ijtihād* compared to its medieval counterpart, when issues were more predictable due to the slower pace of social change. Nevertheless, many Muslim scholars in contemporary times think that focus should be on *qawā'id* and *maqāṣid* more than on *uṣūl al-fiqh*, believing that the legal theory of *uṣūl al-fiqh* has not adequately responded to the demands of renewal and *ijtihād* in the era of statutory legislation. They consider that *uṣūl* is now studied mainly as an academic discipline that falls short of meeting the demands of *ijtihād*. Furthermore, according to some scholars, *qawā'id* should be given priority over *qiyās*, which is the most important element in *uṣūl al-fiqh* with regard to *ijtihād*. According to them, *qiyās* originally is to attach a single issue (which has no clear legal determination) to another single issue (whose legal status has

already been determined by the *Qurʾān*, the *Sunnah*, etc.), whereas the nature of *qawāʿid* is to attach a single issue to several other issues, which already have legal status. This simply means that *al-qawāʿid al-fiqhiyyah* reduce the effort of *mujtahids* in extracting legal rulings for new issues.

(3) *Al-qawāʿid al-fiqhiyyah* are not of one type, nor do they enjoy the same level of importance in *fiqhī* thought. They vary according to several aspects and considerations, namely comprehensiveness, being agreed upon or not, and independence. The first category contains *qawāʿid* that apply to all chapters of *fiqh* without specification, and are called: *al-qawāʿid al-khams al-kubrā* (the five universal maxims). The second category contains *qawāʿid* that apply to many chapters of *fiqh*, yet are not as comprehensive in their application as the first group; *al-Suyūṭī* and *ibn Nujaym* described this kind of *qawāʿid* as *al-kulliyyāt*. The third category contains *qawāʿid* that are abstractions of the rules of *fiqh* on specific themes and chapters, such as the chapters of prayer, fasting, marriage, etc. and are called *ḍawābiṭ* (controllers). On the other hand, *qawāʿid*, are either agreed upon by all schools of law or not; the latter may also be controversial even within a single school. *Qawāʿid*, at last, are either independent principles or subsidiaries that serve other more general ones in multiple approaches.

(4) Although *al-qawāʿid al-fiqhiyyah* serve the *fiqhī* thought significantly, they are distinct from many other disciplines within the remit of the thought, such as *uṣūl al-fiqh*, *al-ashbāh wal-naẓāʾir*, *al-furūq* and *al-naẓariyyāt al-fiqhiyyah*. As for *uṣūl al-fiqh*, it is concerned with the methodology that the jurist must follow in the process of deduction of the

*fiqh* rulings and laws from the sources. However, the main function of *al-qawā'id fiqhiyyah* is to help the jurist have a considered understanding of the different chapters of *fiqh*, without needing to remember all of the *fiqh juz'iyāt*. As for *al-ashbāh wal-naẓā'ir*, being a genre of legal literature that was devoted to the *furū'* (particulars), some scholars use the term in the same sense as *al-qawā'id al-fiqhiyyah*; yet, it is more comprehensive, according to others, to include *qawā'id*, *furūq*, *hiyal*, and other related legal subjects. *Ilm al-Furūq* is the means by which jurists have distinguished between the cases in the law whose appearances resemble each other, but their legal statuses are different. *Al-naẓariyyāt al-fiqhiyyah* (the general theories of *fiqh*) -such as *naẓariyyat al-'aqd* (theory of contract), *naẓariyyat al-darūrah* (theory of necessity) and *naẓariyyat al-milkiyyah* (theory of ownership)- appeared in the modern writings of *fiqh* whose authors have been exposed to Western legal literature. They are distinct from *al-qawā'id al-fiqhiyyah* as they are wider in scope, and that *qawā'id* may play the role of *fiqhī* controllers of some aspects within a *naẓariyyah*. However, some *qawā'id* are more general than the *naẓariyyāt* in terms of being used in many chapters of the *fiqh*, and also used in all the *naẓariyyāt*. *Al-yaqīn lā yazūl bil-shakk* (certainty is not overruled by doubt), for example, is used in all the abovementioned *naẓariyyāt* as a controller.

(5) The four schools of law agreed upon many *qawā'id* in terms of their wordings, implications, significations and most of their applications, although each school has its own exclusive *qawā'id*. However, the final wordings of most *qawā'id* have appeared after huge processes of refinement,

editing and modification in later centuries by scholars in different schools. Nevertheless, legal conceptions of *qawā'id* were known to the leading figures of the established schools of law and their disciples, because legal principles of comprehensive nature are of a remarkable presence in the books of the early *fuqahā'*, such as *al-Kharāj* of Abū Yūsuf, *al-Aṣl* of al-Shaybānī and *al-Umm* of al-Shāfi'ī, who used them in justifying the preferred juridical rulings, and as ways of *al-istidlāl al-qiyāsī* (the analogical proving). Yet, generally speaking, tracing the ascription of each single *qā'idah* to the person who first uttered or formulated it is difficult, and in many cases impossible

(6) Traditional works on *qawā'id* were mainly limited to the author's own school and rarely mention or refer to any *qawā'id* outside of their particular *madhhab*, except, of course, for the general agreed upon *qawā'id*. Nevertheless, no single traditional book was devoted exclusively to the technical known *qawā'id*, although many of them have this term in their titles. Rather, all were inclusive of *qawā'id*, different legal rulings, and-or linguistic, theological, and *uṣūlī* rules.

However, although the second and third *Hijrī* centuries (eighth and ninth AC) were the law-making era of Islamic scholarship, the collection of *al-qawā'id al-fiqhiyyah* in separate written works commenced only in the following century, i.e. the fourth / tenth century. In this regard, the first existing written work on *qawā'id* is *al-Uṣūl* of al-Karkhī (d. 340 / 951). It is a collection of 37 maxims, some of which are merely directive ideas of the

Ḥanafī School's ways of *istidlāl* (proving things) and style of *ijtihād* rather than as technical *qawā'id*.

Authorship on *qawā'id* seems to have lost momentum for three centuries, as no book on *qawā'id* was reported to have been compiled after *al-Uṣūl* in the following decades of the fourth / tenth century, with the exception of two books; namely: *Uṣūl al-Fityā* by Muhammad ibn al-Ḥārith al-Khushanī al-Mālikī (d.361 / 972), and *Ta'sīs al-Nazā'ir* by Abū al-Layth al-Samarqandī (d.373 / 984). Likewise, no *qawā'id* book has been reported to be compiled in the fifth / eleventh century except for *Ta'sīs al-Nazar* by Abū Zayd al-Dabbūsī (d. 430 / 1039), nor was any in the sixth / twelfth century except for three books: 1. *al-Qawā'id* by ibn Dust (d. 507 / 1113), *Īdāh al-Qawā'id* by °Alā'uddīn al-Samarqandī (d. 539 / 1144) and *al-Qawā'id* by al-Qāḍī °Iyāḍ (d.544 / 1149). Once again, not many books were reported to have been compiled in the seventh / thirteenth century.

However, a marked resurgence of interest in *qawā'id* is noted from the beginning of the eighth / fourteenth century onward, which was reflected in the jurists' efforts to deduce general rules by way of induction from the legal manuals of the *madhāhib*. This century is regarded by many as the golden age of the development of *°ilm al-qawā'id al-fiqhiyyah*. It witnessed the compilation of many works upon which most of the books compiled later, depended in one way or another. Moreover, it is after this point of time that *al-qawā'id al-fiqhiyyah* started to be distinguished clearly from other types of *qawā'id*, such as *al-qawā'id al-uṣūliyyah*, the linguistic rules, and others.



A matter of surprise, however, is that although the Ḥanafīs were pioneers in collecting *qawā'id* in separate books and treatises, their contribution in the eighth / fourteenth century in this regard was very limited. Out of the many books, only one has been ascribed to a Ḥanafī scholar; namely, *al-Qawā'id Fil-Furū'* by Sharafuddīn al-Ghazzī (d.799 / 1397).

According to some researchers, the ninth / fifteenth century did not witness real ingenuity in the field of *al-qawā'id al-fiqhiyyah*. According to them, most of what was written was merely rewriting or editing of the books, which were written in the previous century; very few of them have been seen as significant, although they added other examples to illustrate the *qawā'id*. In contrast, to many writers, the tenth / sixteenth century represented the beginning of the mature stage for the science of *al-qawā'id al-fiqhiyyah*. It witnessed the compilation of respected books on the discipline in most schools. These books enjoyed a more enhanced reputation than the works of the earlier centuries. The important event which took place in this century is the renaissance of interest on *qawā'id* within the Ḥanafī school in this field, although it provided only one (available) book; namely (*al-Ashbāh wal-Naẓā'ir*) by ibn Nujaym al-Miṣrī (d.970 / 1562), which was arranged in a well-organized manner, and has been the focus of many subsequent Ḥanafī books.

The period from the beginning of the eleventh / seventeenth century onwards up to mid-thirteenth / nineteenth century witnessed more attention on the genre of *al-qawā'id al-fiqhiyyah* in terms of the number of works on the one hand, and with regard to the explanation of the *qawā'id* and the

processes of refining them to reach to their final wordings, on the other. The Ḥanafī scholars were more active in this phase and introduced tens of books, surpassing the other schools both in number and quality. The remarkable thing is that the large number of books of *qawā'id*, which were written in this period relate in one way or another to three books, namely *al-Ashbāh wal-Naẓā'ir* of al-Suyūṭī, *al-Ashbāh wal-Naẓā'ir* of ibn Nujaym and *al-Manhaj al-Muntakhab* by al-Zaqqāq al-Mālikī. However, other books besides these works have been compiled in this period, which followed different manners in presenting the *qawā'id fihiyyah*.

In the modern times (from the mid-nineteenth century onward), authorship on *qawā'id* adopted various approaches to introduce the genre, many of which were not used by classical authors. As such, unlike classical works, *qawā'id* books in this era comprise them exclusively, i.e. they do not include principles of other genres, such as *al-qawā'id al-uṣūliyyah*, grammatical rules, etc. In this regard, the 99 *qawā'id* included in the introductory section of *Majallat al-Aḥkām al-Adliyyah* are, generally speaking, good examples of (pure) *fiqhī* maxims. The significance of this point lies in the fact that it helps much in the codification of Islamic law in many Muslim countries. Moreover, orientation in this period was towards discussing the theoretical and historical aspects of *qawā'id*, which was totally neglected by traditional works, except for some mention of classifications and sources of *qawā'id* in a few books. *Al-Qawā'id al-Fihiyyah* (1998) by Ya'qūb al-Baḥusayn is one of the good works in this regard. Editing *qawā'id* manuscripts is significant in this context, because this provides information about the political, social and cultural

environments of the authors' different times, and provides a critical overview of the content of the manuscripts. Moreover, this effort contributes to evaluating the roles of the manuscript authors in serving *qawā'id fihiyyah*, and determining how valued the manuscript is, in this genre. Further, for serving *ijtihād*, the concern of many contemporary writers is how to make the use of *qawā'id* in this intellectual process easier and more accessible. Some tend to extract *qawā'id* from traditional *fiqh* books. Others collect *qawā'id* in large encyclopedias, some of which is limited to *qawā'id* that relate to specific chapters of *fiqh*, because much of the *ijtihād* activity is on contemporary issues pertaining to these chapters. *Mawsū'at al-Qawā'id wal-Dawābiṭ al-Fiqhiyyah al-Hākimah lil-Mu'āmalāt al-Māliyyah fī-l-Fiqh al-Islāmī* (1999) by Ali al-Nadwī is, in this context, a collection of 3107 *qawā'id* related to *fiqh al-Mu'āmalāt* (transactions). Some writers preferred to study specific *qawā'id* and discuss all of their relevant researches in detail, providing ready and comprehensive information about these *qawā'id* for the *mujtahids*, in order to save their time and effort. *Al-Niyyah Wa-ṭatharuhā Fī-l-Aḥkām al-Shar'īyyah* (1983) by Ṣāliḥ al-Sadlān is about intention and its impact on legal rulings, which is the subject of the first of the five universal *qawā'id*, i.e. "*al-umūr bi-maqāṣidihā*" (matters are judged in light of the intention behind them).

(7) The five universal *qawā'id*, including their subsidiary *qawā'id*, are considered the most important in the whole discipline, and seen as representative of the entire field; so much so that other *qawā'id* are seen as a commentary on them. It is said that the whole *fiqh* is based on them, and

the essence of the *Sharī'ah* as a whole is grasped between them. They are as follows: 1. *al-umūr bi-maqāṣidihā* (matters are judged in light of the intention behind them), 2. *al-ḍarar yuzāl* (harm must be eliminated). 3. *Al-mashaqqah tajlib al-taysir* (hardship begets facility). 4. *al-yaqīn lā yazūl bil-shakk* (certainty is not overruled by doubt). 5. *al-ʿādah muḥakkamah* (custom is the basis of judgment). It is remarkable that the concepts, which the five *qawāʿid* represent (namely: intention, certainty, removal of hardship, elimination of harm and custom) are mainly ethical, and are integral to the general Islamic concept of *maṣlahah*, and of course, have legal function in this context.

(8) *Al-qawāʿid al-kuliyyah* are the *qawāʿid* that are applicable to many particulars from various chapters, yet are of less comprehensiveness and scope of application than the five universal ones. Among many authors of classical *qawāʿid* works, al-Subkī, al-Suyūṭī and ibn Nujaym devoted special sections in their books to discuss this sort of *qawāʿid* exclusively. Al-Subkī described them as: *al-qawāʿid al-ʿāmmah*, and listed twenty six *qawāʿid* under this title, whereas al-Suyāṭī and ibn Nujaym called them: *qawāʿid kulliyyah* and listed forty and nineteen *qawāʿid* respectively. *Qawāʿid* in the three lists are similar, and many of them are identical in their wordings; for example, seventeen of the *qawāʿid* of ibn Nujaym's list are in al-Suyūṭī's. It worth mentioning that, besides the five universal *qawāʿid* and their subsidiaries, most of the *qawāʿid* of *Majallat al-Aḥkām al-ʿAdliyyah* belong to this kind of rules.

(9) There have been two different views with regard to whether or not *qawā'id* can be considered an independent source of the law. While some maintain that a jurist must not rely on *qawā'id* to deliver a ruling unless they affirm and reiterate a ruling of the Qur<sup>ʿ</sup>ān or *Sunnah*, some state that a judicial decision can be reversed if it contains a violation of the generally accepted *qawā'id*.

(10) Contemporary scholars made use of *qawā'id* in their endeavor to determine the legal ruling for the various novel issues. They have used them as one of the methods of *ijtihād* in the absence of *nuṣūṣ* or stronger sources, such as *ijmā'*. In this respect, *qawā'id* have been used, beside other tools, to find legal determinations for many existing medical issues. The last chapter in the thesis examined the use by scholars of *qawā'id* in six selected issues, namely: 1. the profession of medical practice, 2. abortion, 3. organ donation, 4. anaesthetization, 5. plastic surgery, and 6. repairing the ruptured hymen. However, there is no particular *qawā'id*, which are specified to encompass the medical issues exclusively; rather they are included within the remit of various *qawā'id*, whose general legal rulings are applicable to them. However, through induction, medical issues have a strong presence within the remit of the five universal *qawā'id* and many of their subsidiaries.

## Appendix

*Al-Qawā'id al-Kulliyyah* in the Collections of al-Suyūṭī, Ibn Nujaym and the *Majalla*

<b><i>Qawā'id</i> in Arabic (transliterated)</b>	<b>English Translation</b>
1. <i>al-ijtiādu lā unqaḍu bīl-ijtihād.</i>	one legal interpretation does not destroy another.
2. <i>al-tābi' u tābi.</i>	an accessory which is attached to an object in fact is also attached to it in law.
3. <i>al-taṣṣarrufu 'alā al-ra'īyyati manūṭun bil-maṣlahah.</i>	management of citizen's affairs is dependent upon public welfare.
4. <i>i'mālu al-kalāmi awlā min imālih.</i>	a word should be construed as having some meaning, rather than disregarding it.
5. <i>al-kharāju bil-ḍamān.</i>	the enjoyment of a thing is the compensating factor for any liability attaching thereto.
6. <i>al-su'ālu mu'ādun fīl-jawāb.</i>	a question is considered to have been repeated in the answer.
7. <i>lā yunsabu ilā sākitin qawl.</i>	no statement is imputed by to a man who keeps silence.
8. <i>mā ḥaruma akhduh ḥaruma i'tā'uh.</i>	when it is forbidden to take a thing it is also forbidden to give it.
9. <i>man ista'jala al-shay'a qabla awānihi 'uqiba bi-ḥirmānih.</i>	any person, who hastens the accomplishment of a thing before its due time, is punished by being deprived thereof.
10. <i>al-wilāyatu al-khāṣṣatu aqwā min al-wilāyati al-'āmmah.</i>	private trusteeship is more effective than public trusteeship.
11. <i>lā 'ibrata bil-ẓanni al-biyyin khata'uh.</i>	no validity is attached to conjecture which is obviously tainted by error.
12. <i>dhikru ba'di mā lā atajazza' u ka-dkikri kullih.</i>	A reference to a part of an indivisible thing is regarded as a reference to the

	whole.
13. <i>idhā ijtama<sup>ʿ</sup>a al-mubāshiru wal-mutasabbibu uḍifa al-ḥukmu ilā al-mubāshir.</i>	In the presence of the direct author of an act and the person who is the cause thereof, the first alone is responsible therefor.

***Al-Qawāʿid al-Kulliyyah* which are in the Collections of Al-Suyāṭī and Ibn Nujaym.**

<b><i>Qāʿidah</i> in Arabic (transliterated)</b>	<b>English Translation</b>
1. <i>idhā ijtama<sup>ʿ</sup>a al-ḥalālu wal-ḥarāmu ghulliba al-harām.</i>	if two considerations relate to one thing, and that one made it prohibited and the other made it lawful, priority should be given to prohibition.
2. <i>al-ḥurru lā yadkhulu taḥta al-yad.</i>	a free person cannot be under possession.
3. <i>al-ḥudūdu tudra<sup>ʿ</sup>u bil-shubuāt</i>	<i>ḥudūd</i> punishments are to be warded off if doubts persist
4. <i>idhā ijtama<sup>ʿ</sup>a amrānī min jinsin wāḥidin wa-lam yakhtaliḥ maqṣūduhumā: dakhala aḥaduhumā fīl-ākhar</i>	If two things (which belong to one category and aim to achieve one target) exist in one situation: doing one of them is sufficient.
5. <i>al-farḍu afḍalu mina al-nafl.</i>	(doing) what is obligatory is better than (doing) what is made optional.

***Al-Qawāʿid al-Kulliyyah* which are in *Majallat al-Aḥkām al-ʿAdliyyah* Only.**

<b>The <i>Qāʿidah</i> in Arabic (transliterated)</b>	<b>The English Translation</b>
1. <i>al-aṣlu fīl-kalāmi al-ḥaqīqah.</i>	in principles, words shall be construed according their real meaning.
2. <i>lā ʿibrata lil-dilālāti fī muqābili al-taṣrīḥ.</i>	no attention shall be paid to inferences (implication) in the face of an explicit statement.
3. <i>lā masāgha lil-ijtihādi fī mawrid al-naṣṣ.</i>	where there is a decisive text, there is no room for <i>ijtiād</i> .

4. <i>mā thabata ʿalā khilāfī al-qiyās fa-ghayruhu lā yuqāsu ʿalayh.</i>	a thing established contrary to the <i>qiyas</i> cannot be used as an analogy for other things.
5. <i>mā ḥaruma fīʿluhu ḥaruma ʿalā talabuh.</i>	when it is forbidden to perform an act it is also forbidden to request to its performance.
6. <i>idhā taʿārada al-mānīʿu wal-muqtaḍī, yuqaddamu al-mānīʿ.</i>	when prohibition and exigency conflict, preference is given to prohibition.
7. <i>man malaka shayʿan, malaka mā huwa min ʿdarūrātih.</i>	the owner of a thing held in absolute ownership is also the owner of the things indispensable to the enjoyment of such thing.
8. <i>idhā saqaṭa al-aṣlu saqaṭa al-farʿ.</i>	if the principle fails, the accessory also fails.
9. <i>al-sāqiṭu lā yaʿūd, kamā anna al-maʿdūma lā yaʿūd.</i>	a thing which has been discharged or annihilated cannot be restored.
10. <i>idhā baṭala al-shayʿu baṭala mā fī ʿimnihi.</i>	when a thing becomes void, the thing contained in it also becomes void.
11. <i>idhā baṭala al-aṣlu yuṣāru ilā al-badal.</i>	when the original fails it is restored to its substitute.
12. <i>al-baqāʿu aṣḥab min al-ibtidāʾ.</i>	Continuance is easier than commencement.
13. <i>yughtafaru fīl-baqāʾi mā lā yughtafaru fīl-ibtidāʾ.</i>	a thing which is not permissible by way of commencement may be permissible by way of continuance.
14. <i>yughtafaru fīl-tawābiʿi mā lā yughtafaru fī ghayrihā.</i>	a thing which is not permissible in itself, may be permissible as an accessory
15. <i>lā yatimmu al-tabarruʿu illā bi-qabḍ.</i>	a gift becomes complete by delivery.
16. <i>idhā taʿadhdharat al-ḥaqīqtu yuṣāru ilā al-majāz.</i>	when the real meaning cannot be applied, the metaphorical sense may be used.
17. <i>idhā taʿadhdhara iʿmālu al-kalāmi yuhmal.</i>	if no meaning can be attached to a word it is disregarded altogether.
18. <i>al-muṭlaqu yajrī ʿalā iṭlāqihi mā lam yaqum dalīlun al-taqyīdi naṣṣan aw dīlālah.</i>	the absolute is construed in its absolute sense, provided that there is no proof of a restricted meaning either in the explicit text or by



	implication
19. <i>al-waṣfu fīl-ḥāḍiri laqhwun wa-fī al-ghāʾibi muʿtabar.</i>	a description with reference to a thing present is of no consequence, but the contrary is the case if such a thing is not present.
20. <i>dalīl al-shayʾi fīl-umūri al-bāṭinati yaqūmu maqāmah.</i>	in obscure matters, the proof of a thing stands in the place of such a thing.
21. <i>al-kitābu kal-khiṭāb.</i>	correspondence resembles conversation
22. <i>al-ishāratu al-maʿhūdatu lil-akhrasi kal-bayāni bil-lisān.</i>	the recognized signs of a dumb person take the place of a statement by word of mouth.
23. <i>yuqbalu qawlu al-mutarjimi muṭlaqan.</i>	the word of an interpreter is accepted in every respect.
24. <i>lā ḥujjata maʿa al-iḥtimālī al-nāshiʾi ʿan dalīl.</i>	no argument is admitted against supposition based upon evidence.
25. <i>lā ʿibrata lil-tawahhum.</i>	no weight is attached to fancy.
26. <i>al-thabitu bil-burhāni kal-tābitu bil-ʿayān</i>	a thing established by proof is equivalent to a thing established by visual inspection.
27. <i>al-bayyinatu ʿalā al-muddaʿi wal-yamīnu ʿalā man ankar.</i>	the burden of proof is on him who alleges; the oath on he who denies.
28. <i>al-bayyinatu li-ithbāti khilāfi al-ẓāhiri wal-yamīnu li-ibqāʾi al-aṣl.</i>	the object of evidence is to prove what is the contrary to the apparent fact.
29. <i>al-bayyinatu ḥujjatun mutaʿaddiyatun wal-iqrāru ḥujjatun qāṣirah.</i>	evidence is an absolute proof in that it affects a third person; admission is relative proof in that it affects only the person making such an admission.
30. <i>al-marʾu muʾākhadun bi-iqrārih.</i>	a person is bound by his own admission.
31. <i>lā ḥujjata maʿa al-tanāquḍi walākin lā yakhtallu maʿahu ḥukmu al-ḥākim.</i>	contradiction and proof are incompatible, but this does not invalidate a judgment.
32. <i>qad yathbutu al-farʿu maʿa ʿadami thubūti al-aṣl.</i>	failure to establish the principal claim does not imply failure to establish a claim subsidiary thereto.
33. <i>al-muʿallaqu bil-shartī yajibu</i>	anything dependent upon a condition

<i>thubūtuḥu ma<sup>ʿa</sup> thubūti al-sharṭ.</i>	precedent is established on the happening of the condition.
34. <i>yalzamu murā<sup>ʿ</sup>ātu al-sharṭi qadra al-īmḵān.</i>	a condition must be fulfilled as far as possible.
35. <i>al-mawā<sup>ʿ</sup>idu biṣuwari al-ta<sup>ʿ</sup>ālīq takūnu lāzimah.</i>	promises dependent upon a condition precedent are irrevocable.
36. <i>al-ajru wal-ḍamānu lā yajtami<sup>ʿ</sup>ān.</i>	remuneration and liability do not run together.
37. <i>al-ghurmu bil-ghunm.</i>	liability is an obligation accompanying gain.
38. <i>al-ni<sup>ʿ</sup>matu bi-qadri al-niqmati wal-niqmatu bi-qadri al-ni<sup>ʿ</sup>mah.</i>	the burden is in proportion to the benefit and the benefit to the burden.
39. <i>al-jawāz al-shar<sup>ʿ</sup>i yunāfi al-ḍamān.</i>	legal permission is incompatible with liability.
40. <i>yudāfu al-fi<sup>ʿ</sup>lu ilā al-fā<sup>ʿ</sup>ili lā al-āmīrī, mā lam yakun mujbaran.</i>	the responsibility for an act falls upon the author thereof; it does not fall upon the person ordering such an act, provided that such a person does not compel the commission thereof.
41. <i>idhā ijtama<sup>ʿa</sup> al-mubāshiru wal-mutasabbibu yudāfu al-fi<sup>ʿ</sup>lu ilā al-mubāshir.</i>	in the presence of the direct author of an act and the person who is the cause thereof, the first alone is responsible thereof.
42. <i>al-mubāshiru ḍaminun wa-<sup>ʿ</sup>in lam yata<sup>ʿ</sup>ammad.</i>	liability lies on the direct author of an act, even though acting unintentionally.
43. <i>al-mutasabbibu lā yaḍmanu illā bil-ta<sup>ʿ</sup>ammud.</i>	no liability lies on a person who is the cause of an act unless he has acted intentionally.
44. <i>jināyatu al-<sup>ʿ</sup>ajmā<sup>ʿ</sup>i jubār.</i>	no liability attaches in connection with injury caused by animals of their own accord.
45. <i>al-amru bil-taṣarrufi fī milki al-ghayr bāṭil.</i>	any order given for dealing with the property of others is void.
46. <i>lā yajūzu li-aḥadin an yataṣarraf fī milki al-ghayri bi-lā idnih.</i>	no person may deal with the property of another without such a person's permission.
47. <i>lā yajūzu li-aḥadin an ya<sup>ʿ</sup>khudha māla al-ghayri bi-lā sababin shar<sup>ʿ</sup>i.</i>	no person may take another person's property without legal cause.

48. <i>tabaddulu sababi al-milk qā'imun maqāma tabadduli al-dhāt.</i>	any change in the cause of the ownership of a thing is equivalent to a change in that thing itself.
49. <i>man sa'ā fī naqdi mā tamma min jihatihī fasa'yuhu mardūdun 'alayh.</i>	if any person seeks to disavow any act performed by himself, such an attempt is disregarded.

## BIBLIOGRAPHY

## BIBLIOGRAPHY

Abder-Rahman, H.A., "Hymen Care for Unmarried Muslim Females: Role of the Forensic Consultant in Gynaecology Interventions", in: *Eastern Mediterranean Health Journal*, Vol. 15, No. 4, year is not known.

Abdur-Razak, Sheikh Faisal, *Actions are by Intentions* (Toronto: Al-Attique Publishers Inc, 1999).

Al-Ābī, *Jawāhir al-Iklīl Sharḥ Mukhtaṣar Sīdī Khalīl* (Beirut, Dār al-Ma<sup>c</sup>rifah).

Abū Dawūd, Sulaymān Ibn al-Ash<sup>c</sup>at, *Sunan Abī Dawūd*, Ed. Muhammad Muhyiddīn <sup>c</sup>Abdul-Ḥamīd, (Beirut: Dār al-Fikr).

Abū Ḥayyān, *al-Baḥr al-Muḥīt*, Second Edition, (Beirut, Dār al-Fikr, 1983).

Abū al-<sup>c</sup>Iyāl, Ayman, "Fikrat Ḍaman al-<sup>c</sup>Aqd Fīl-Fiḥ al-Islāmī", in: *the Journal of The University of Damascus*, Vol. 19, No. 2, (2003).

Abū Yūsuf, Ya<sup>c</sup>qūb, *al-Kharāj*, Third Edition, (Cairo, al-Maṭba<sup>c</sup>ah al-Salafiyyah, 1382 A. H.).

Abū Zahrah, Muhammad, *al-Jarīmah wa al-<sup>c</sup>Uqūbah fī al-Fiḥ al-Islāmī*, (Cairo: Dār al-Fikr al-<sup>c</sup>Arabī, N.D).

Abū Zahrah, Muhammad, *al-<sup>c</sup>Uqūbah fīl-Fiḥ al-Islāmī*, (Cairo, Dār al-Fikr al-<sup>c</sup>Arabī, n.d).

Abū Zahrah, Muhammad, *Mālik*, Second Edition, (Cairo, Dār al-Fikr al-<sup>c</sup>Arabī, 1952).

Abū Zahrah, Muhammad, *Uṣūl al-Fiḥ*, (Cairo: Dār al-Fikr al-<sup>c</sup>Arabī).

Ahmad, Shoayb, *The Development of Islamic Jurisprudence (Fiḥ) and Reasons for Juristic Disagreement Among Schools of Law*, a Master thesis submitted to the University of South Africa, (November, 2005).

Al-<sup>c</sup>Alā<sup>ṣ</sup>ī, *al-Majmū<sup>c</sup> al-Mudhhib Fī Qawā<sup>c</sup>id al-Madhhab*, ed. Muhammad Al-Sharīf, First Edition, (Kuwait, Wazārat al-Awqāf, 1994).

Al-<sup>c</sup>Ālim, Yūsuf Ḥāmid, *al-Maqāṣid al-<sup>c</sup>Āmmah lil- Shari<sup>c</sup>ah*, Second Edition, (Riyadh: al-Dār al-<sup>c</sup>Ālamiyyah lil-Kitāb al-Islāmī, 1994).

Alinio, Jennifer, *Importance Of Medicine In Our Daily Lives*, Health and Fitness: Medicine, March 12, 2007, at: ([http://ezinearticles.com/?expert=Jennifer\\_Alinio](http://ezinearticles.com/?expert=Jennifer_Alinio)).

<sup>c</sup>Allīsh, Muhammad, *Minaḥ al-Jalīl*, (Cairo, al-Maṭba<sup>c</sup>ah al-Kubrā al-<sup>c</sup>Āmirah, 1294 A.H.).

Al-Amiri, Rashed Saud, *Legal Maxims in Islamic Jurisprudence*, (A PhD theses, submitted to the University of Birmingham, 2003).  
Al-Ashqar, ʿUmar, “al-ʿUrf Bayna al-Nazariyyah Wal’ Taṭbīq”, in: *The Journal of International Islamic Fiqh Academy*, Fifth Issue, 1988, 11120.

Aramesh, Kiarash, “Abortion: An Islamic Ethical View”, in: *Iranian Journal of Allergy, Asthma and Immunology*, Vol. 6, No. 5, year is not known, pp. 29-33.

Atiyeh, Bishara and others, *Aesthetic Surgery and Religion: Islamic Law Perspective*, Aesth Plast Surg (2008).

ʿAṭiyyah, Jamāluddīn, *al-Tanzīr al-Fiqhī*, First Edition, (Cairo: Maṭbaʿat al-Madīnah, 1987).

ʿAṭiyyah, Jamāluddīn, *Naḥwa Tafʿīl Maqāṣid al-Sharīʿah*, (Damascus, Dār al-Fikr, 2003).

Bahnasī, Ahmad Fathī, *al-Masʿūliyyah al-Jināʿiyyah Fil-Fiqh al-Islāmī*, Fourth Edition, (Cairo, Dār al-Shurūq, 1988).

Bahnasī, Ahmad Fathī, *Nazariyyat al-Ithbūt fil-Fiq al-Jināʿī al-Islāmī*, fifth edition, (Cairo, Dār al-Shurūq, 1989).

Al-Bāḥusayn, Yaʿqūb, *al-Furūq al-Fiqhiyyah wal-Uṣūliyyah*, First Edition, (Riyadh: Maktabat al-Rushd, 1998).

Al-Bāḥusayn, Yaʿqūb, *al-Maʿayir al-Jaliyyah*, First Edition, (Riyadh, Maktabat al-Rushd, 2006).

Al-Bāḥusayn, Yaʿqūb, *al-Mufaṣṣal fil-Qawāʿid al-Fiqhiyyah*.

Al-Bāḥusayn, Yaʿqūb, *al-Qawāʿid al-Fiqhiyyah: al-Mabādiʿ, al-Muqawwimāt, al-Maṣādir, al-Dalīliyyah, al-Taṭawwur*.

Al-Bahūtī, Mansūr, *Kashshāf al-Qināʿ*, Ed. Hilāl Miṣīlhi, (Beiryat: Dār al-Fikr, 1402 A.H.).

Al-Bāqillānī, Abū Bakr, *Tamhīd al-Awāʿil*, Second Edition, (Beirut: Muʾassasat al-Kutub al-Thaqāfiyyah, 1987).

Al-Bayhaqi, *AI-Sunan AI-Kubra*, (Beirut: Dar Ihya' AI-Turath AI'Arabi).

Al-Bukhārī, Muhammad Ibn Ismāʿīl, *al-Jāmiʿ al-Ṣaḥīḥ*, Third Edition, (Beirut: Dār Ibn Kathīr, 1987).

Al-Būrnū, Muhammad Ṣidqī, *al-Wajīz fi Idāḥ al-Qawāʿid al-Fiqhiyyah*, Fourth Edition, (Beirut, Muʾassasat al-Risālah, 1996).

Al-Būrnū, Muhammad Ṣidqī, *Mawsū'at al-Qawā'id al-Fiqhiyyah*, (Beirut, Mu'assasat al-Risālah).

Al-Būṭī, Muhammad Sa'īd, *Kubrā al-Yaqīniyyāt al-Kawniyyah*, (Damascus: Dār al-Fikr, 1993).

Al-Būṭī, Muhammad Sa'īd, *Mas'alat Taḥdīd al-Nasl: Wiqāyah wa-'Ilāj*, Fourth Edition, (Damascus, Maktabat al-Fārābī).

Cline, Austin, *Bonds of Tradition, Customs, and Habits from the Past, Traditional Authority*, at: [http://atheism.about.com/od/religiousauthority/a/types\\_3.htm](http://atheism.about.com/od/religiousauthority/a/types_3.htm).

Coulson, N. J., *A History of Islamic Law*.

Al-Duwaiḥī, Ahmad, *al-Qawā'id al-Fiqhiyyah al-Ḥākimah li-Ijhād al-Ajinnah al-Mushawwahah* (un published paper submitted to *Nadwat Taṭbīq al-Qawā'id al-Fiqhiyyah 'Alā al-Masā'il al-Ṭibbiyyah* (the workshop for the application of the *qawā'id fiqhiyyah* on the medical issues), Riyadh, 1429 A.H. (2008).

El-Garī, Muhammad Ali, "Credit Risk in Islamic Banking and Finance", in: *Islamic Economic Studies*, Vol. 10, No. 2, March 2003 (Jiddah, Islamic Research and Training Institute, Islamic Development Bank).

Al-Fādānī, Yāsīn, *al-Fawā'id al-Janiyyah*, (Beirut, Dār al-Bashā'ir, 1991).

Faṭḥallah, Wasīm, *al-Kata' al-Ṭibbī Mafhūmuh wa-Athāruh* at <http://www.saaaid.net/tabeeb/65.htm>.

Ghānim, 'Umar, *Aḥkām al-Janīn fil-Fiqh al-Islāmī*, First Edition, (Beirut, Dār Ibn Ḥazm, 2001).

Al-Ghazālī, Abū Ḥāmid, *al-Mustaṣfā Min 'Ilm al-'Uṣūl*, First Edition, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1413 A.H).

Al-Ghazālī, Abū Ḥāmid, *Iḥyā' 'Ulūm ad-Dīn*, (Samarang / Indonesia: Kiryatā Fūtrā).

Al-Ghiryānī, Aṣ-Ṣādiq, *Mudawwanat al-Fiqh al-Mālikī wa Adillatuh*, First Edition, (Beirut: Mu'assasat ar-Rayyān, 2002).

Al-Ghiryānī, al-Ṣādiq, *Taṭbīqāt Qawā'id al-Fiqh 'Inda al-Mālikiyyah*, First Edition, (Tripoli: Manshūrāt Jāmi'at al-Fātiḥ, 2007).

Al-Ghumārī, Abdullah, *Ta'rif Ahl al-Islām Bi-anna Naql al-'Uḍw Ḥarām*, ed. Ṣafwat Jawdat Ahmad, (Cairo, Maktabat al-Qāhirah, 1998).

Ḥakamī, Ḥafīz, *Ma'ārij al-Qabūl*, (Riyadh: Dār Ibn al-Qayyim, 1995).

Hakim, Besim, "The ʿUrf and its Role in Diversifying the Architecture of Traditional Islamic Cities", in: *Journal of Architectural and Planning Research*, Chicago, (Summer, 1994).

Al-Ḥamawī, *Ghamz Uyūn al-Baṣāʾir*, First Edition, (Beirut, Dār al-Kutub al-ʿImiyyah, 1985).

Hammād, Hamzah, *Manāḥij al-Taʿlīf al-Muʿāṣirah Fil-Qawāʿid al-Fiqhiyyah*, at: (<http://www.feqhweb.com/vb/showthread.php?t=1296&page=1>).

Al-Ḥanbalī, Ibn Rajab, *al-Qawāʿid fil-Fiqh al-Islāmī*, (Beirut: Dār al-Maʿrifah, ND).

Al-Ḥanbalī, Ibn Rajab, *Jāmiʿ al-ʿUlūm wa al-Ḥikam*, Ed. Shuʿayb al-ʿArnaʿūt and Ibrahīm Bājis, Second Edition, (Beirut: Muʿassasat al-Risālah, 1991).

Hanson, Hamza Yusuf, *Principles of Islamic bioethics* at: ([http://www.radcliffe-oxford.com/books/samplechapter/8129/Sheikh\\_chpt%2004-51127780rdz.pdf](http://www.radcliffe-oxford.com/books/samplechapter/8129/Sheikh_chpt%2004-51127780rdz.pdf)).

Al-Ḥarīrī, Ibrahīm, *al-Qawāʿid al-Fiqhiyyah al-Kulliyyah*, First Edition, (Amman: Dār ʿAmmār, 1998).

Harmūsh, Maḥmūd Muṣṭafā, *al-Qāʿidah al-Kulliyyah Iʿmāl al-Kalām Awlā Min Ihmālih Waʾatharuhā fil-ʿUṣūl*, First Edition, (Beirut, al-Muʿassasat al-Jāmiʿiyyah lil-Dirāsāt wal-Nashr, 1987).

Hasan, Aznan, "A Comparative Study of Islamic Legal Maxims in Majallat al-Ahkam al-ʿAdliyyah, Jordanian Civil Code and United Arab Emirates Law of Civil Transaction", in: *The Islamic Quarterly*, Volume: 152.

Hashemi, Seyed Abbas, *Responsibility of States for Expropriation of Alien Property, New Perspective with reference to Islamic Law and the State Practice of Iran*, a thesis submitted for the degree of Doctor of Philosophy at the Faculty of Law, the University of Sydney, (March 2000).

Al-Ḥaṣīn, ʿAbd al-Salām, *al-Qawāʿid wal-Dawābiṭ al-Fiqhiyyah Lil-Muʿāmalāt al-Māliyyah ʿInd Ibn Taymiyyah*, First Edition, (Cairo, Dār al-Taʾaṣil, 2002).

Al-Ḥaṣīn, ʿAbd al-Salām, *Tatbīq al-Qawāʿid al-Fiqhiyyah ʿAlā Masāʾil al-Takhdīr al-Muʿāṣirah*, (un published paper submitted to *Nadwat Tatbīq al-Qawāʿid al-Fiqhiyyah ʿAlā al-Masāʾil al-Tibbiyyah* (the workshop for the application of the *qawāʿid fiqhiyyah* on the medical issues), Riyadh, 1429 A.H. (2008).

Hassaballah, Abdel Moneim, "Definition of death, organ donation and interruption of treatment in Islam", in: *Nephrol Dial Transplant* (1996).



Ḥaydar, Alī, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*, translated by Fahmī al-Ḥusaynī, (Beirut, Dār al-Kutub al-ʿIlmiyyah).

Heinrichs, Wolfhart, “Qawāʿid as a Genre of Legal Literature”, in: “*Studies in Islamic Law and Society, Vol. 15: Studies in Islamic Legal Theory, ed Bernard G. Weiss*, (Leiden: Brill, 2002), pp. 365-384”.

Heinrichs, Wolfhart, “Structuring the Law: Remarks on the Furūq Literature”, in: *Studies in Honour of Clifford Edmund Bosworth*, ed. Ian Richard Netton Volume I. (Leiden: Brill, 2000).

Hooper, C. A., “The Mejelle. Articles 1-100”, in: *Arab Law Quarterly*, Vol. 1, No. 4 (Lieden, BRILL, Aug., 1986), pp. 373-379”.

Ibn ʿĀdam, Mufti Muhammad (*Dārul-Iftāʾ* (Leicester, UK), *Is organ donation permissible?* at: (<http://www.themodernreligion.com/misc/hh/organ-transplant.html>).

Ibn al-Najjār, *Sharḥ al-Kawkab al-Munīr*, ed. Muhammad al-Zuḥaylī & Nazīh Ḥammād (ed), First Edition (Damascus, Dār al-Fikr, 1980).

Ibn, ʿAbd al-Barr, Abū ʿUmar, *al-Tamhīd*, Ed. Muṣṭafā al-ʿAlawī & Muhammad al-Bakrī, (Morocco: Wazārat al-Awqāf, 1387 A.H.).

Ibn ʿAbd al-Salām, ʿIzzuddīn, *Qawāʿid al-Aḥkām Fī Maṣāliḥ al-Anām*, ed. Mahmūd al-Shinqīṭī, (Beirut: Dār al-Maʿārif).

Ibn ʿĀbidīn, Muhammad Amīn, *Radd al-Muḥtār ʿAlā al-Dur al-Mukhtār*, (Beirut, Dār al-Fikr, 2000)

Ibn ʿĀbidīn, Muhammad Amīn, *Rasāʾil Ibn ʿĀbidīn*, (Istanbul, Dār Saʿadat).

Ibn al-ʿArabī, Abū Bakr, *aḥkām al-Qurʾān*, Third Edition, ed. Muhammad ʿAṭā, (Beirut: Dar al-Kutub al-ʿIlmiyyah, 2003).

Ibn Ali, Zayd, *Musnad al-Imām Zayd*, (Beirut, Dār al-Kutub al-ʿIlmiyyah, n.d.).

Ibn al-Wakīl, Muhammad ibn ʿUmar, *al-Ashbāḥ wal-Naẓāʾir*, Second Edition, (Riyadh, Maktabat al-Rushd, 1997).

Ibn ʿĀshūr, Muhammad, *Maqāṣid al-Sharīʿah al-Islāmiyyah*, (Tunis, al-Sharikah al-Tūnisiyyah lil-Tawzīʿ, 1978).

Ibn Farḥūn, Burhānuddīn, *Tabṣirat al-Ḥukkām*, ed. Jamal Marʿashlī, First Edition, (Beirut, Dār al-Kutub al-ʿIlmiyyah, 1995).

Ibn Hanbal, Ahmad, *Musnad ai-Imam Ahmad Ibn Hanbal* (Misr: Dar Al-Ma'arif).

Ibn Kathīr, Ismāʿīl, *Tafsīr al-Qurʾān al-ʿAzīm*, First Edition, (Beirut, Dār Ibn Ḥazm, 2000).

Ibn Manẓūr, *Lisān al-ʿArab* (Beirut, Dār Ṣādir, 1968).

Ibn Nuḡaym, *al-Ashbāh wal-Naẓāʾir*.

Ibn Qayyim al-Jawziyyah, Shamsuddīn, *al-Ṭuruq al-Ḥukmiyyah Fil-Siyāsah al-Sharʿiyyah*, ed. Muhammad Ghazī, (Cairo, Maṭbʿat al-Madanī).

Ibn Qayyim al-Jawziyyah, Shamsuddīn, *Iʿlām al-Muwaqqiʿin ʿAn Rabb al-ʿĀlamīn*, ed. Ṭaha Saʿd, (Cairo, Maktabat al-Kulliyyat al-Azhariyyah, 1968).

Ibn Rushd, Abū-l-Walīd, *Bidāyat al-Mujtahid*, Sixth Edition, (Beirut, Dār al-Maʿrifah, 1982).

Ibn Taymiyyah, Taqiy al-Dīn, *Majmūʿ al-Fatāwā*, Third Edition, (Mansūrah: Dār al-Wafāʾ, 2005).

Ibn Taymiyyah, Taqiy al-Dīn, *Rafʿ al-Malām ʿAn al-ʿaʿimmah al-ʿĀlām*, (Riyadh: Wakalat al-Ṭibāʿah wa al-Tarjamah, 1413 A.H).

ʿIlwān, Ismāʿīl, *al-Qawāʿid al-Fiqhiyyah*.

Ismail, Y and Abozaid, A. (2007). *Management Concepts and Islamic Legal Maxims: An Analysis of Selected Uṣūl Al-Fiqh and Al-Qawāʿid Al-Fiqhiyyah Books*, International Conference on Management from Islamic Perspectives (ICMIP-2007), Organized by Department of Business Administration, KENMS, IIUM, at Hilton Kuala Lumpur, Malaysia, 15-16 May.

Izzi Dien, Mawil, *Islamic Law From Historical Foundations To Contemporary Practice*, (Edinburgh: Edinburgh University Press Ltd., 2004).

Jackson, Sherman, “Islamic Law and the State”, in: *Studies in Islamic Law and Society*, ed. Ruud Peters and Bernard Weiss, Volume 1, (Leiden, BRILL, 1996).

Jaʿīt, Kamāluddīn, “al-ʿUrf”, in: *The Journal of International Islamic Fiqh Academy*, Fifth Issue, 1988.

Jalīl, Abdullah, “The Significance of Maṣlaḥah Concept And Doctrine of Maqasid (Objectives) Al-Sharīʿah In Project Evaluation”, in: *The Journal of Muamalat and Islamic Finance Research (JMIFR)*, Islamic University College of Malaysia, Vol. 3, No. 1.

Al-Jamal, Sulaymān, *Ḥāshiyat al-Jamal ʿAlā al-Manhaj*, (Beirut, Dār al-Fikr).

Jawdat, Ahmad and others, *al-Majalla*, (Beirut, al-Maṭbaʿah al-Adabiyyah, 1302 A.H.).

Al-Jawharī, *al-Ṣiḥāḥ*, First Edition, (Beirut, Dār al-Kutub al-ʿIlmiyyah, 1999).

Al-Jazāʿirī, ʿAbd al-Majīd Jumʿah, *al-Qawāʿid al-Fiḥhiyyah al-Mustakhrajah Min Kitāb ʿAlal-Muwaqqiʿin*, First Edition, (Riyadh, Dār Ibn al-Qayyim).

Jistīnyah, Ḥanān, *al-Qawāʿid wal-Dawābiṭ al-Ḥākimah li-ʿAmaliyyat al-Tajmīl*, (a paper submitted to the second conference for Islamic Jurisprudence held in Imam Muhammad Ibn Saud University in Riyadh in 1431 A.H (2010) discussing contemporary medical issues. The papers were published in five large volumes), Vol. 3.

Al-Jīzanī, Muhammad, *Fiqh al-Nawāzil: Dirāsah Taʿsiliyyah Taṭbiqiyyah*, Second Edition, (Dammām, Dār Ibn al-Jawzī, 2006).

Jubayr, Hānī, *al-Dawābiṭ al-Sharʿiyyah lil-ʿAmaliyyāt al-Tajmīliyyah*, (a paper submitted to a workshop discussing cosmetic surgeries between *fiqh* and medicine, held in Riyadh in 1427 A.H (2006), at: (<http://www.gunfdh.com/vb/showthread.php?t=2698>).

Al-Jurjānī, al-Sharīf *al-Taʿrīfāt*, First Edition, (Beirut, Dār al-Kutub al-ʿIlmiyyah, 1983).

Al-Kafawī, Abū al-Baqāʾ, *al-Kulliyyāt*, (Beirut, Muʿassasat al-Risālah, 1992).

Kahf, Monzer, “Economic of Liability: An Islamic View”, in: *IIUM (The International Islamic University Malaysia) Journal of Economics and Management*, Vol. 8, no. 2 (Kuala Lumpur, 2000).

Kamali, Mohammad Hashim, “A Shariʿh Perspective on AIDS”, in: *Farid Esack and Sarah Chiddy, eds, Islam and AIDS: Between Scorn, Pity and Justice*, Oxford: Oneworld Publications, 2009).

Kamali, Mohammad Hashim, *Istihsan and the Renewal of Islamic Law*, 8, International Institute of Advanced Islamic studies (IAIS), Malaysia, See: [www.iais.org.my](http://www.iais.org.my).

Kamali, *Principles Of Islamic Jurisprudence*.

Kamali, Mohammad, *Shariʿah Law: an Introduction*, (Oxford, Oneworld Publications, 2008).

Kamali, Muhammad Hashim, "Source, Nature and Objectives of Shari'ah", in: *The Islamic Quarterly*, Volume XXXIII, Number 4, Fourth Quarter, 1410:1989, (London, the Islamic Cultural Center).

Kandil, Elsayed, *Abortion in Islam*, at: (<http://www.missionislam.com/health/abortion.htm>).

Kasule, Omar Hasan, *Medical Ethics from Maqasid Al Shari'a* at: (<http://islamthought.wordpress.com/2008/12/14/medical-ethics-from-maqasid-al-shari%E2%80%99a/>).

Al-Kawthari, Muhammad Ādam: *Is Organ Donation Permissible?* at: ([http://qa.sunnipath.com/issue\\_view.asp?id=2043](http://qa.sunnipath.com/issue_view.asp?id=2043)).

Al-Khādīmī, Abū Sa'īd, *Manāfi' al-Daqā'iq Sharḥ Majāmi' al-Ḥaqā'iq*, (Istanbul, Dār al-Ṭibā'ah al-Āmirah, 1308 A.H.).

Al-Khafīf, Ali, *al-Damān fil-Fiqh al-Islāmī*, (Beirut: Dār al-Fikr al-Ārabī, 2000).

Al-Khalīfī, Riyād, "al-Qawā'id al-Fiqhiyyah: Ḥujjiyyatuhā wa-Ḍawābiṭ al-Istidlāl Bihā", in: "*Majallat al-Shari'ah wal-Dirāsāt al-Islāmiyyah, Kuwait*, Vol. 18, No. 55 (December 2003), pp. 281-347".

Khalīl, Ibrāhīm, *al-Ightisāb Ahkām wa-Āthār*, at: (<http://www.airssforum.com/showthread.php/45633-الاغتصاب-أحكام-وآثار>).

Khaṭṭāb, Ḥasan al-Sayyid, "Qā'idat al-Ḍarūrāt Tubīḥ al-Maḥḍūrāt Wataṭbīqātuhā al-Mu'āṣirah fil-Fiqh al-Islāmī", in: *Majallat al-Uṣūl wal-Nawāzil*, Vol. 2, 1430 A. H.

Al-Khirashī, Abdullah, *Sharḥ Mukhtaṣar Khalīl*, (Cairo, al-Maṭba'ah al-Kubrā al-Amīriyyah, 1317 A.H.).

Korff, Douwe, *A Guide to the Implementation of Article 2 of the European Convention on Human Rights*, First Edition, (Council of Europe, 2006).

Al-Kūzḥaṣārī, Mustafa, *Manāfi' al-Daqā'iq Sharḥ Majma' al-Ḥaqā'iq*, (Cairo, Al-Maṭba'ah al-Āmirah, 1288 A.H.).

Al-Laḥjī, Abdullah, *Īdāḥ al-Qawā'id al-Fiqhiyyah Liṭullāb al-Madrasah al-Sawlatiyyah*, Third Edition, ().

Laldin, Mohamad Akram, *A Mini Guide to Shari'ah and Legal Maxims*,

Laldin, Mohamad Akram, *Islamic Law and Custom: Historical Account From the Time of the Prophet Till Present*, at: <http://www.isra.my/media-centre/downloads.html?task=finish&cid=168&catid=5>,

Le Roy, Patrick, *Liability and Compensation for Bodily Injury Under Islamic Law*, Injury Under Islamic Law.

Libson, Gideon, "On the Development of Custom as a Source of Law in Islamic Law: Al-Rujū<sup>c</sup> Ilā al-<sup>c</sup>Urf Aḥadu al-Qawā'id al-Khams Allatī Yatabannā 'Alayha al-Fiqhū", in: *Islamic Law and Society*, BRILL, Vol. 4, No. 2 (1997).

Libson, G. and Stewart, F.H. *Urf, Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Brill, 2010.

Linant de Bellefonds, Y. *Kafāla*, Encyclopaedia of Islam, Second Edition. Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Brill.

Mahmassani, Ṣubḥī, *Falsafat al-Tashrī fī al-Islām*, translated by Farhat J. Ziadeh, (Leiden, Brill, Netherlands, 1961).

Maḥmaṣānī, Subḥī, "Transaction in the Sharī'ah", Chapter VII in: *Law in the Middle East, Volume I: Origin and Development of Islamic Law*, ed. Majid Khadduri and Herbert J. Liebesny, (Washington D. C., the Middle East Institute, 1955).

*Majallat al-Majma' al-Fiqhī al-Islāmī* (*The Journal of the Islamic Fiqh Council*), Vol. 7, No. 3, 1992; Vol. 7, 1995; Vol. 21, 2006.

Al-Mālikī, Muhammad Ali, *Tahdhīb al-Furūq*, (Beirut, 'Ālam al-Kutub, ND).

Al-Maqdisī, Ibn Qudāmah, *al-Mughnī*, First Edition, (Beirut: Dār al-Fikr, 1405 A. H).

Al-Maqqarī, *al-Qawā'id*, ed. Ahmad Bin Ḥumayd, First Edition, (Mecca: Jāmi'at Umm al-Qurā: Markaz Iḥyā' al-Turāth al-Islāmī, 1996).

Manṣūr, Muhammad, *al-Aḥkām al-Ṭibbiyyah al-Muta'alliqah bil-Nisā'*, First Edition, (Amman, Dār al-Nafā'is, 1999).

Al-Maṭrūdī, Ali, *Taṭbīq al-Qawā'id al-Fiqhiyyah 'Alā Masā'il al-Ṭibbiyyah*, (unpublished paper submitted to *Nadwat Taṭbīq al-Qawā'id al-Fiqhiyyah 'Alā al-Masā'il al-Ṭibbiyyah* (the workshop for the application of the *qawā'id fiqhiyyah* on the medical issues) Riyadh, 1429 A.H. (2008).

Megā, Jibrīl Ibn al-Mahdī, *Dirāsah Taḥlīliyyah Mu'ṣṣalah Litakhrīj al-Furū' 'Alāl-uṣūl*, (a PhD thesis at Umm al-Qurā University, 1422 A.H.).

Ministry of Awqāf, Kuwait, *-Mawsū'ah al-Fiqhiyyah "al-Kuwaitiyyah"*.

Al-Mīs, Khalīl, "al-<sup>c</sup>Urf", in: *The Journal of International Islamic Fiqh Academy*, Fifth Issue, 1988,.

Moghul, Umar F., No Pain, No Gain: "The State of the Industry in Light of an American Islamic Private Equity Transaction", in: *The Chicago Journal of International Law*, Vol. 7, No. 2 (Chicago, 2007).

Mohammed, Khaleel, "The Islamic Law Maxims", in: *Islamic Studies*, Vol. 44, No. 2 (Summer 2005).

Mughal, Munir Ahmad, *Islamic Legal Maxims Based on al-Karkhi's al-Usul*, (Lahore, Kazi Publications, 1998).

Muhammad Raḥīm, Ibrāhīm, *Aḥkām al-Ijḥād fil-Fiqh al-Islāmī*, First Edition, (Manchester, Publications of Majallat al-Ḥikmah, 2002).

Al-Nadwī, °Alī, *al-Qawā'id al-Fiqhiyyah: Mafhūmuhā, Nash'atuhā, Taṭawwuruhā*, Fourth Edition, (Damascus, Dār al-Qalam, 1998).

Al-Najjār, Muṣliḥ, *al-Dawābiṭ al-Shar'īyyah lil-'Amaliyyāt al-Tajmīliyyah*, (a paper submitted to the second conference for Islamic Jurisprudence held in Imam Muhammad Ibn Saud University in Riyadh in 1431 A.H (2010) discussing contemporary medical issues. The papers were published in five large volumes), Vol. 3.

Al-Nawawī, Yaḥyā Ibn Sharaf, *al-Majmū' Sharḥ al-Muhadhdhab*, (Beirut: Dār al-Fikr, 1997).

Al-Nawawī, Yaḥyā Ibn Sharaf, *Rawḍat at-Ṭālibīn*, Second Edition, (Beirut: al-Maktab al-Islāmī, 1985).

Al-Nawawī, Yaḥyā Ibn Sharaf, *Sharḥ an-Nawawī °Alā Ṣaḥīḥ Muslim*, Second Edition, (Beirut: Dār Iḥyā' at-Turāth, 1972).

Noel, James, "Muslim Custom and Case-Law", in: *Die Welt des Islams*, New Series, BRILL, Vol. 6, Issue 1/2 (1959).

Powers, Paul R, Intent in Islamic Law, Motive and Meaning in Medieval Sunnī Fiqh", in: *Studies in Islamic Law and Society*, ed. Ruud Peters and Bernard Weiss, (Leiden: Brill, 2006).

Al-Qabaj, Sāmī, *Majallat al-Aḥkām al-'Adliyyah: Maṣādiruhā Wa-Atharuhā Fī Qawānīn al-Sharq al-Islāmī*, (Amman, Dār al-Faṭḥ lil-Dirāsāt, 2008).

Al-Qaḥṭānī, Ḥanān, °*Amaliyyat Tajmīl al-Thady*, (a paper submitted to the second conference for Islamic Jurisprudence held in Imam Muhammad Ibn Saud University in Riyadh in 1431 A.H (2010) discussing contemporary medical issues. The papers were published in five large volumes), Vol. 4.

Al-Qarfī, Shihbuddīn, *al-Dhakhīrah*, First Edition, ed. Muhammad Ḥajjī, (Beirut, Dār al-Gharb al-Islāmī, 1994).

Al-Qarāfī, Shihāb al-Dīn, *al-Furūq*, ed: Muḥammad Rawās Qalʿagī, (Beirut: Dār al- Maʿrifah, ND).

Al-Qarāfī, Shihābuddīn, *al-Iḥkām fī Tamyīz al-Fatāwā ʿAn al-Aḥkām*, ed. ʿAbd al-Fattāh Abū Ghuddah, Second Edition, (Beirut: Dār al-Bashāʿir al-Islāmiyyah, 1995).

Al-Qarahdāghī, Alī and al-Muḥammadi, Ali, *Fiqh al-Qadāyā al-Ṭibbiyyah al-Muʿāṣirah*, Second Edition, (Beirut, Dār al-Bashāʿir, 2006).

Al-Qardāwī, Yūsuf, *al-Ḥalāl wal-Ḥarām Fil-Islām*, 22<sup>nd</sup> Edition, (Cairo, Maktabat Wahbah, 1997).

Al-Qardāwī, Yūsuf, *al-Ijtihād Fil-Sharīʿah al-Islāmiyyah*, First Edition, (Kuwait, Dār al-Qalam, 1996).

Al-Qardāwī, Yūsuf, *Min Ajli Ṣaḥwatin Rāshidah*, First Edition, (Cairo: Dār al-Shurūq, 2001).

Al-Qaṭṭan, Mannāʿ, *Tārīkh al-Tashrīʿ al-Islāmī*, Fifth Edition, (Cairo, Maktabat Wahbah, 2001).

Al-Qurṭubī, al-Jāmiʿ li-Aḥkām al-Qurʾān, (Cairo: Dār al-Kitāb al-ʿArabī, 1967).

Qūṭah, ʿĀdil, *al-ʿUrf ʿInda al- Ḥanābilah*, First Edition, (Makkah: al-Maktabah al-Makkiyyah, 1997).

Rabb, Intisar, *Doubt's Benefit: Legal Maxims in Islamic law, 7th-16th Centuries*, a PhD thesis submitted to Princeton University in 2009. See information at: ([http://works.bepress.com/intisar\\_rabb/12/](http://works.bepress.com/intisar_rabb/12/)).

Rahman, Fazlur, *Health and Medicine in the Islamic Tradition*, (New York, the Crossroads Publishing Company, 1987).

Ramdān, ʿAṭiyyah ʿAdlān, *Mawsūʿat al-Qawāʿid al-Fiqhiyyah al-Munazzimah Lil-Muʿāmalāt al-Māliyyah al-Islāmiyyah*, (Alexandria, Dār al-Imān, 2007).

Ramlee, Zulfakar, *The Role of al-Qarīnah (Circumstantial Evidence) in Islamic Law of Evidence: a Study of the Law in Malaysia, with Reference to the Rules and Principles of English Law*, a PhD thesis submitted to Department of Law and Public Administration Glasgow Caledonian University, Glasgow, (December 1997).

Al-Raysūnī, Ahmad; Al-Zuhaylī, Muhammad; Shubayr, Muhammad, *Huqūq al-Insān Miḥwar Maqāṣid al-Sharīʿah*, Kitāb al-Ummah, No. 87, (Doha, Wazārat al-Awqāf wal-Shuʿūn al-Islāmiyyah, Marsh 2002).

Al-Rūgī, Muhammad, *Nazariyyat al-Taḳīd al-Fiqhī wa-Atharuhā fī-Ikhtilāf al-Fuqahā*<sup>o</sup>.

Al-Rugī, Muhammad, *Qawā'id al-Fiqh al-Islāmī Min Khilāl Kitāb al-Ishrāf 'Alā Masā'il al-Khilāf*, First Edition, (Damascus, Dār al-Qalam, 1998).

Rustum, Salīm, *Sharḥ al-Majallah*, (Beirut, Dār al-Kutub al-Ilmiyyah).

Al-Sadlān, Ṣāliḥ, *al-Qawā'id al-Fiqhiyyah al-Kubrā*, First Edition, (Riyadh: Dār Balansiyyah, 1417 A.H.),

Saed, Muhammad, *Jurisprudence and Islamic Rulings: Transactions – Part 8*, (London, MSA Publication Limited, 2007).

Al-Sam'ānī, *Qawā'ti' al-'Adillah fī al-'Uṣūl*, (Beirut: Dār al-Kutub al-Ilmiyyah, 1997).

Al-Sanbahlī, Muhammad burhān al-Dīn, *Qaḍāyā Fiqhiyyah Mu'aṣirah*, First Edition, (Damascus, Dār al-Qalam, 1408 A.H.).

Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr lil' Shaybānī*, First Edition, ed. Muhammad Ḥasan al-Shāfi'ī, (Beirut: Dār al-Kutub al-Ilmiyyah, 1997).

Schacht, Joseph, *An Introduction to Islamic Law*, (Oxford: Oxford University Press, 1964).

Schacht, Joseph, *the Origins of Muhammadan Jurisprudence*,

Al-Shādhilī, Ḥasan, *Hukm Naql al-A'ḍā' fil-Fiqh al-Islāmī*, (Cairo, Kitāb al-Jumhūriyyah, 1989).

Al-Shāfi'ī, Muhammad IKbn Idrīs, *al-'Umm*, Second Edition, (Beirut: Dār al-Ma'rifah, 1393 A.H.).

Shaikh, Sa'diyya, *Family planning, Contraception and Abortion in Islam*, at:  
([http://www.religiousconsultation.org/family\\_planning\\_in\\_Islam\\_by\\_Shaikh\\_p4.htm](http://www.religiousconsultation.org/family_planning_in_Islam_by_Shaikh_p4.htm))

Sharaf al-Dīn, 'Abdul-'Azīm, *Tārīkh al-Tashrī' al-Islāmī*.

Al-Shāṭibī, Abū Ishāq, *al-Muwāfaqāt*, (Cairo, Dār al-Fikr al-'Arabī).

Al-Shawkānī, Muhammad, *Irshād al-Fuḥūl*, First Edition, (Beirut: Dār al-Fikr, 1992).

Al-Shawkānī, Muhammad, *Nayl al-Awtār*, (Cairo, Maṭba'at Muṣṭafā al-Ḥalabī).

Al-Shinqīṭī, Muhammad al-Mukhtār, *Aḥkām al-Jirāḥah*, Second Edition, (Jeddah, Maktabat al-Ṣaḥābah, 1994).



Al-Shirbīnī, Muhammad al-Khaṭīb, *Mughnī al-Muḥtj*, (Beirut: Dār al-Fikr).

Al-Shirwānī, Abdulḥamīd, *Hāshiyat al-Shirwān ʿAlā Tuḥfat al-Muḥtāj*, (Beirut, Dār Iḥyāʾ al-Turāth al-ʿArabī)

Shubayr, Muhammad, *al-Qawāʿid al-Kulliyyah wa al-Ḍawābiṭ al-Fiḥhiyyah*, Second Edition, (Amman: Dār al-Nafāʾis, 2007).

Al-Subkī, Tāj al-Dīn Ibn al-Ashbāh wa al-Nazāʾir, First Edition, (Beirut, Dār al-Kutub al-ʿIlmiyyah, 1991).

Al-Suyūṭī, Jalāl al-Dīn, *al-Ashbāh wal-Nazāʾir*, First Edition, (Beirut, Dār al-Kutub al-ʿIlmiyyah, 1983).

Al-Ṭabarī, Ibn Jarīr, Jāmiʿ al-Bayān.

Al-Taftāzānī, Saʿd al-Dīn, *Sharḥ al-ʿAqāʾid al-Nasafiyyah*, (Cairo: Maktabat al-Kulliyyāt al-Azhariyyah, 1987).

Al-Tahānawī, Muhammad, *Kashshāf Iṣṭilāḥāt al-Funūn*, ed. Ali Daḥrūj, First Edition, (Beirut, Maktabat Lubnān, 1996).

Ṭalāfḥah, Muhammad, “Qāʿidat al-Jawāz al-Sharʿī Yunāfī al-Ḍamān Wataṭbīqātuhā fil-Fiḥ al-Islāmī wal-Qānūn”, in: *Al-Majallah al-Urduniyyah fil-Dirāsāt al-Islāmiyyah*, Vol. 2, No. 4 (al-Mafraq - Jordan -, 2006).

Al-Tasūlī, Abū al-Ḥasan, *al-Bahjah fī Sharḥ al-Tuḥfah*, First Edition, ed. Muhammad Shāhīn, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1998).

Al-Ṭūfī, Najmuddīn, *Sharḥ Mukhtaṣar al-Rawḍah*, Second Edition, ed. Abdullah al-Turkī, (Riyadh: Wazārat al-Shuʾn al-Islāmiyyah, 1998).

Tyser, C.R.; Demetriades, D.G.; and Effendi, Ismail Haqqi, *The Mejelle*, Second Reprint, (Kuala Lumpur, the Other Press, 2007).

Al-ʿUbaydī, Ḥammādī, *al-Shāṭibī wa-Maqāṣid al-Sharīʿah*, First Edition, (Beirut, Dār Qutaybah, 1992).

Vogel, Frank E. And Hayes, Samuel L., *Islamic Law and Finance*, (The Hague, Kluwer Law International, 1998).

Al-Wansharīsī, Abul-ʿAbbās, *ʿIddat al-Burūq fī Jamʿ Mā fil-Madhhab min al-Jumūʿ wal-Furūq*, ed. Ḥamzah Abū Fāris, First Edition, (Beirut: Dār al-Gharb al-Islāmī, 1990).

Al-Wansharīs, Abul-ʿAbbās, *Īdāh al-Masālik*.

Wāsil, Naṣr Farīd, *Nazariyyat al-Daʿwā wal-Ithbāt*, (Cairo, Dār al-Shurūq, 2002).

Wensinck, A.J. "Niyya." *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman , Th. Bianquis , C.E. Bosworth , E. van Donzel and W.P. Heinrichs. Brill, 2009.

Yaseen, Mohammad Naeem, "The Rulings for the Donation of Human Organs in the Light of Sharī'a Rules and Medical Facts", in: *Arab Law Quarterly*, Vol. 5, No. 1 (Feb., 1990).

Yasīn, Muhammad, *Ratq Ghishā' al-Bakārah fī Mizān al-Maqāṣid al-Shar'īyyah* at: (<http://majles.alukah.net/showthread.php?t=15874>).

Zahraa, Mahdi, "Legal Personality in Islamic Law", in: *Arab Law Quarterly*, Vol. 10, No.3, 1995, pp. 193-206).

Zahraa, Mahdi, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research", in: *Arab Law Quarterly*, BRILL, Vol. 18, No. 3/4 (2003).

Zakariyah, Luqman, *Applications of Legal Maxims in Islamic Criminal Law with Special Reference to Sharī'ah Law in Northern Nigeria (1999-2007)*, a PhD thesis submitted to the University of Wales, Lampeter in 2009.

Al-Zarkashī, Badr al-Dīn, *al-Baḥr al-Muḥīṭ*, First Edition, ed. Muhammad Tāmīr, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2000).

Al-Zarkashī, Badr al-Dīn, *al-Manthūr fīl-Qawā'id*, First Edition, ed. Taysīr Fā'iq, (Kuwait: Mu'assast al-Khalīj li al-Ṭibā'ah wa al-Nashr, 1982).

Al-Zarqā, Ahmad, *Sharḥ al-Qawā'id al-Fiqhiyyah*, Second Edition, (Damascus: Dar al-Qalam, 1989),

Al-Zarqā, Muṣṭafā, *al-Fi'l al-Dār wal-Damān Fih*, (Damascus: Dār al-Qalam).

Al-Zarqā, Muṣṭafā, *al-Madkhal al-Fiqhī al-ʿĀm*, First Edition, (Damascus, Dār al-Qalam, 1998).

Zaydān, ʿAbdulkarīm, *al-Madkhal li-Dirāsāt al-Sharī'ah al-Islāmiyyah*, Fourth Edition, (Alexandria, Dār ʿUmar Ibn al-Khaṭṭāb, 1969).

Zaydān, ʿAbdulkarīm, *al-Wajīz fī Uṣūl al-Fiqh*, (Baghdad: Mu'assasat Qurṭubah, N.D.).

Al-Zūḥaylī, Muḥammad, *Al-Qawā'id al-Fiqhiyyah wa-Taṭbīqātuhā fīl-Madhāhib al-Arba'ah*, First Edition, (Damascus: Dār al-Fikr, 2006),

Al-Zuḥaylī, Wahbah, *Uṣūl al-Fiqh al-Islāmī*, First Edition, (Damascus, Dār al-Fikr, 1986).

Al-Zuḥaylī, Muhammad, *Wasā'il al-Ithbāt fī al-Sharī'ah al-Islāmiyyah*, First Edition, (Damascus, Dār al-Bayān, 1982).

Al-Zuḥaylī, Wahbah, “Subul al-Istifādah min al-Nawāzil wal’ ‘Amal al-Fiqhī fil’ Taṭbīqāt alMu‘āṣirah”, in: *The Journal of International Islamic Fiqh Academy*, Eleventh Issue, 1998.